TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 353 100

A. J. KIZER, PLAINTIFF IN ERROR,

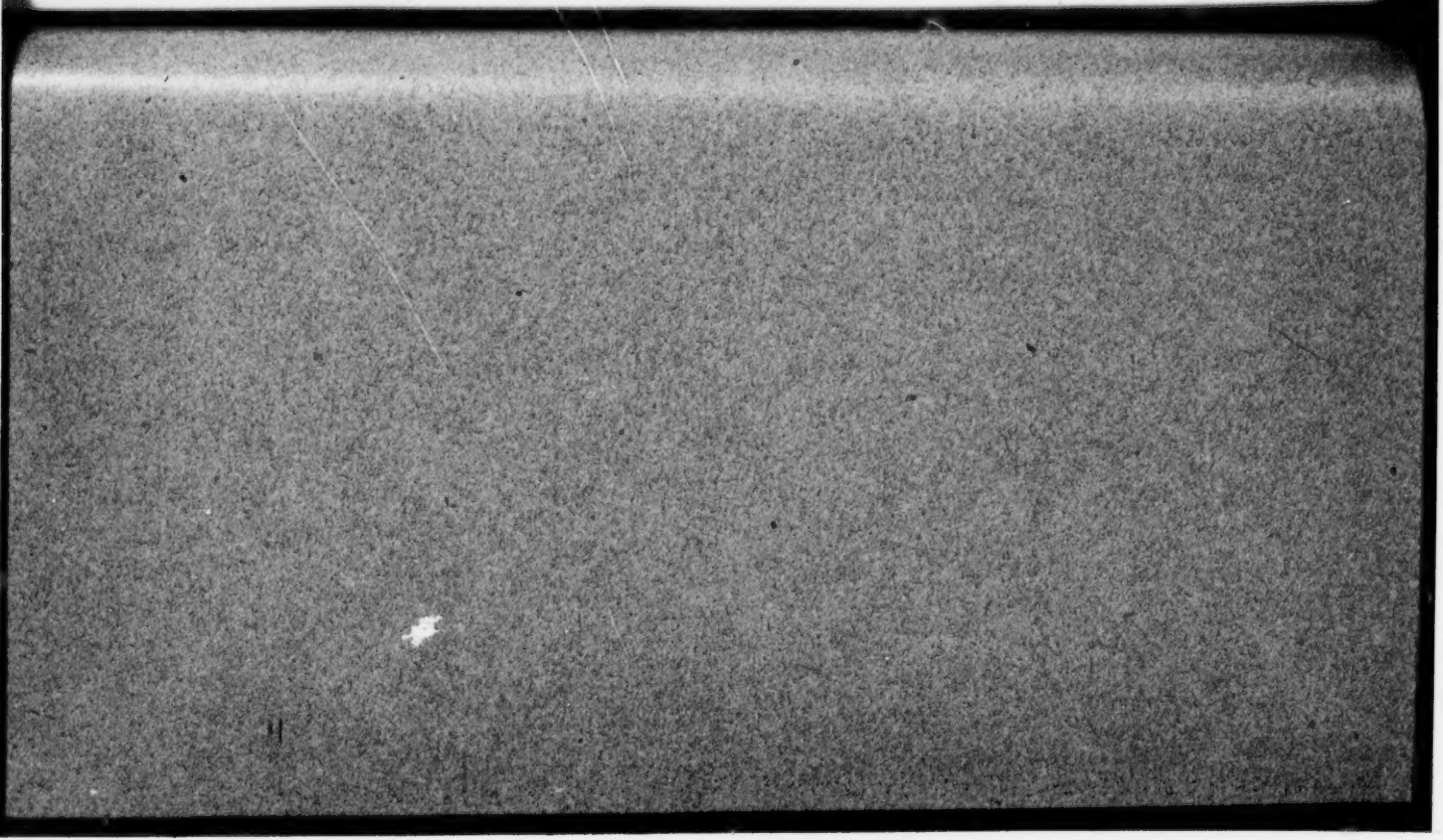
vs.

THE TEXARKANA AND FORT SMITH RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

FILED JULY 18, 1899.

(17,467.)



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I In the Supreme Court of Arkansas.

A. J. KIZER, Plaintiff in Error,
vs.
THE TEXARKANA & FT. SMITH RAILWAY COMPANY, Def't in Error. } No. 3452.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court in a suit in which the said A. J. Kizer is plaintiff and The Texarkana & Ft. Smith Railway Company is defendant, being No. 3452 of the docket of said court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in said suit between said above-named parties, wherein was drawn in question the validity of an authority exercised under the laws of the United States and the decision was against this validity, or wherein was drawn in question the construction of the Constitution of the laws of the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under the laws and Constitutions of the United States, a manifest error has happened, to the great damage of the said plaintiff, as by his complaint appears, we, being willing that error, if any has been made, should be duly corrected and full and speedy justice done to the parties aforesaid, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from date thereof, in the said Supreme Court, to be there and then held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to cor-
II rect that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 5th day of July, in the year of our Lord one thousand eight hundred and ninety-nine.

{ The Seal of the Circuit Court of East. Dist. Ark., Western Division, U. S. A. }

W. P. FEILD,
Clerk of the United States Circuit Court for the Eastern District of Arkansas.

Allowed by—
HENRY G. BUNN,
Chief Justice of the Supreme Court of Arkansas.

July 5th, 1899.
1—353

[Endorsed:] No. 3452. A. J. Kizer *vs.* Texarkana & Ft. Smith R'y Co. Writ of error. Filed July 5th, A. D. 1899. P. D. English, clerk.

STATE OF ARKANSAS:

In the Supreme Court.

I, Peyton D. English, clerk of the supreme court of the State of Arkansas, hereby certify that, in obedience to the mandate of the above writ of error, a duly certified transcript, under the seal of said court, of the record and all proceedings in the cause therein stated and named, with all things concerning the same, is hereto attached, duly certified.

Seal of the Supreme Court of Arkansas.

In testimony whereof I hereto set my hand and as such clerk affix the seal of said court, at my office, in the city of Little Rock, Arkansas, this the 12th day of July, A. D. 1899.

PEYTON D. ENGLISH, *Clerk.*

III THE UNITED STATES OF AMERICA:

Supreme Court of the State of Arkansas.

The President of the United States to the Texarkana & Ft. Smith Railway Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, within thirty days' from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of Arkansas, at Little Rock, Arkansas, wherein A. J. Kizer is plaintiff in error and The Texarkana & Ft. Smith Railway Company is defendant in error, to show cause, if any there be, why the judgment against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 5 day of July, in the year of our Lord one thousand eight hundred and ninety-nine.

[Seal of the Supreme Court of Arkansas.]

HENRY G. BUNN,
Chief Justice of the Supreme Court of the State of Arkansas.

STATE OF ARKANSAS, }
County of Miller. }

I hereby certify that this writ came to hand this 7th day of July, 1899, at the hour of 3 o'clock p. m., and I have on the same day duly served the same by delivering a true copy thereof to Wm. T. Hudgins, the attorney of record in this cause of and for the within-

named Texarkana & Ft. Smith Railway Company, and in Miller county, Arkansas.

I. A. BECKHAM,
Sheriff of Miller County, Arkansas.

Fee, 50 cts, paid by pl'ff.

[Endorsed:] No. 3542. A. J. Kizer *vs.* Texarkana & Ft. Smith R'y Co. Citation. Filed July 10th, A. D. 1899. P. D. English, clerk.

IV In the Supreme Court of Arkansas.

A. J. KIZER, Appellant,
vs.
THE TEXARKANA & FT. SMITH RAILWAY COMPANY, Appellee. } No. 3542.

Petition for Writ of Error.

To the honorable the chief justice and associate justices of the supreme court of the State of Arkansas:

The petition of A. J. Kizer, plaintiff and appellant in the above entitled and numbered cause, respectfully shows that on the 15th day of April, 1899, this honorable court rendered a decree and entered judgment herein in favor of the defendant and appellee and against this plaintiff and appellant, which said decree and judgment became final on the 29th day of April, A. D. 1899.

That in said judgment and decree and the proceedings prior thereto certain errors were committed to the prejudice of this plaintiff, all of which will more fully and in detail appear from the assignment of errors which is filed with this petition.

That in this case is involved and actually was raised and decided a Federal question solely, to wit, the construction of the Interstate Commerce Commission act and of sections one, two, and three thereof, and the decision of this court is adverse to this plaintiff.

That this cause of action was based upon a breach or breaches of a written contract between plaintiff and defendant executed in September, 1891, wherein the plaintiff agreed to construct and maintain a saw-mill in Little River county, Arkansas, on the line of the defendant's railway, at a point that had been before by plaintiff selected, and in consideration therefor the defendant agreed to furnish cars
V and ship all lumber manufactured by said mill on all routes over which lumber is usually shipped from Texarkana, at a rate not to exceed two cents per hundred pounds over the rates charged by the different railway companies, and said contract was to be in force until Jan. 1st, 1897. The complaint and amendment thereto alleged breaches thereof by the defendant to the plaintiff's damage in the sum of $1,870.38, the same being charges for the transportation of said plaintiff's lumber over rates on which lumber was usually shipped from Texarkana in excess of said two cents per hundred pounds, as expressed in said contract, and which

said overcharges said plaintiff was compelled to pay to said defendant to have said lumber so carried.

The answer of the defendant alleged that the contract was for the shipment of interstate commerce, and that the said contract was void, and the lower court held that said "contract is unlawful and prohibited by the interstate-commerce act and is void, and said holding is by this court approved and decided to be correct."

That the judgment and decree of this honorable court is in favor of holding and deciding that said contract, which is relied upon, and the branches of which *is* the basis of this suit, is illegal and void because of said interstate-commerce act of the Congress of the United States, wherein a manifest error has happened to the great damage of petitioner.

Wherefore petitioner prays that a writ of error to operate as a supersedeas of the whole judgment may issue in this behalf to the Supreme Court of the United States for the correction of errors so contained, and that a transcript of the records of the proceedings and papers in this case, duly authenticated, may be sent to the said Supreme Court of the United States, and pray for a reversal of said judgment.

VI

OSCAR D. SCOTT,
Attorney for Plaintiff and Appellant.

Allowed.
Let writ issue.
Bond fixed at $500.00.

HENRY G. BUNN,
Chief Justice of the Supreme Court of Arkansas.

Filed July 5th, 1899.

PEYTON D. ENGLISH, *Clerk.*

[Endorsed:] No. 3542. A. J. Kizer *v.* Texarkana & Ft. Smith R'y Co. Petition for writ of error. Filed July 5th, A. D. 1899. P. D. English, clerk.

VII

Supreme Court of Arkansas.

A. J. KIZER, Appellant,
vs.
TEXARKANA & FT. SMITH RAILWAY COMPANY, Appellee. } No. 3452.

Assignment of Errors.

The plaintiff in this cause being the appellant in this court, in connection with his petition for a writ of error, makes the following assignment of errors, which he avers are to be found in the opinion, judgment, and decree of this honorable court herein:

1. The court erred in holding that the facts in this case, as found by the lower or circuit court, as set our on the stat-ment of facts, show that the contract upon which plaintiff Kizer relies is within the prohibition of sections one, two, and three of the interstate-commerce law enacted by Congress.

2. The court erred in holding that the contract to allow appellant Kizer a special rate, in no event to exceed two cents per hundred pounds, would give him an unreasonable preference and advantage over all other shippers of lumber in the same county.

3. The court erred in holding and deciding that said contract was within the provisions of the interstate-commerce law.

4. The court erred in holding that the contract relied on in this case is prohibited by the act of Congress to regulate commerce.

5. The court erred in holding that said contract was void by reason of the provision of said interstate-commerce act.

6. The court erred in rendering a decree and entering judgment herein in favor of the defendant and against the plaintiff.

OSCAR D. SCOTT,
Attorney for Plaintiff.

Filed July 5, 1899.

P. D. ENGLISH, *Clerk.*

[Endorsed:] No. 3452. A. J. Kizer *v.* Texarkana & Ft. Smith R'y Co. Assignment of errors. Filed July 5th, A. D. 1899. P. D. English, clerk.

VIII No. 3452. A. J. Kizer *vs.* Texarkana & F. S. R'y Co. Transcript. Filed August 31, 1896. W. P. Campbell, clerk. Appeal granted by clerk.

IX Pleas before Hon. W. P. Feazel, judge of the Little River circuit court. Judgment rendered July 15th, 1896.

Transcript.

In case of—

A. J. KIZER, Pl'ff,
vs.
TEXARKANA & FT. SMITH R'Y CO., Def't.

1 STATE OF ARKANSAS,
Little River County.

In Little River Circuit Court.

Pleas before the Hon. W. P. Feazel, judge of said court, July term, July 15th, 1896.

In Little River Circuit Court.

A. J. KIZER, Plaintiff,
vs.
THE TEXARKANA & FT. SMITH RAILWAY COMPANY, Defendant.

Complaint at Law.

The plaintiff for his cause of action against the defendant alleges: Said defendant is a railway incorporation, owning and operating a line of railway in and through Little River county, in the State

of Arkansas, and has station-houses and station agents therein upon whom personal process may be served.

Heretofore, on the 16th day of September, 1891, the defendant and plaintiff entered into a written contract, wherein and whereby it was agreed, in consideration of plaintiff's agreement to construct and maintain a saw-mill in Little River county aforesaid, on the line of the defendant's road at a point then selected, which was Rankin, that said defendant would furnish cars and ship all timber manufactured by said mill over all routes over which lumber is usually shipped from Texarkana, Texas, and Texarkana, Arkansas, at a rate not to exceed two cents per hundred pounds, and said contract was to be in force until January 1st, 1897. A true copy of said contract is herewith filed as Exhibit "A" hereto.

Under said contract this plaintiff established, erected, and has maintained said mill in full compliance with all the conditions on his part to be performed, but the defendant has violated and
2 broken said agreements and has overcharged this plaintiff said sum of two cents per hundred pounds and compelled plaintiff to pay the said overcharge before he or his consignee could recover possession of the lumber so shipped. The said overcharges amount in number to three hundred and forty-six, amounting in the aggregate to the sum of thirteen hundred and four & $\frac{15}{100}$ dollars, the particulars of which are set forth in the itemized account herewith filed as Exhibit "B," showing due and unpaid the sum last aforesaid. No part of said overcharges *have* been paid.

Plaintiff prays judgment for his debt, interest, and other relief.

SCOTT & JONES,
Attorneys for Plaintiff.

3 (EXHIBIT "A" TO COMPLAINT.)

STATE OF ARKANSAS, }
Bowie County. }

This agreement by and between W. L. Whittaker as president, manager and owner of the Texarkana & Ft. Smith railway and for and on behalf of the Texarkana & Ft. Smith Railway Company of the first part and A. J. Kizer for himself and his associates, heirs, successors and assigns of the 2nd part witnesseth:

1. That the party of the 2nd part individually or associated with others in partnership or incorporation as he may elect, agrees to construct and maintain a saw-mill in Little River county on the line of said railway for the manufacture of pine, oak and other kinds of lumber at the point already selected by the party of the 2nd part.

2. That the party of the *2nd* part agrees in consideration of the foregoing and for and in behalf of said railway and said company to furnish cars and ship all lumber manufactured by said mill for said party of the second part and for his heirs and successors and assigns of said mill over all routes over which lumber is usually shipped from Texarkana, Texas and Arkansas, at a rate not to exceed two cents per hundred pounds over the rates charged by the different railway companies from Texarkana.

This contract to be in force until January 1st, eighteen hundred and ninety-seven (1897) A. D.

TEXARKANA & FT. SMITH R'Y CO.,
[SEAL.] By W. L. WHITTAKER, *Pres't.*

4 (EXHIBIT "B" TO COMPLAINT.)

T. and Ft. S. R'y Co. claim account, Texarkana, to A. J. KIZER, Dr., wholesale yellow-pine lumber.

RANKIN, ARK., *Dec. 23rd*, 1895.

To O/C in rate as per contract.

Claims.

1893.				
Jan'y 12.	No. 1,	car No. 8552	to La Junta, Col.....	$3.79
" 18.	2,	36650	Commerce, Tex.....	9.83
" 27.	3,	5629	Quincy, Ill.....	3.27
Feb. 1.	4,	5330	Yates Center, Kas...	3.26
" 2.	5,	4347	Ashton, Kas.....	3.82
" 2.	6,	2980	Thayer, Kas.....	3.09
" 6.	7,	8570	Cherry, Kas.....	3.88
" 6.	8,	4847	Garden Plains, Kas..	3.12
" 7.	9,	2236	Cornrick, Kas.....	3.04
" 13.	10,	7598	Wichita, Kans.....	4.06
" 14.	11,	7034	Liberal.....	28.95
" 17.	12,	7056	Benton.....	3.50
" 18.	13,	11359	Des Moines, Ia.....	3.40
" 21.	14,	700	" "	2.56
" 22.	15,	8635	Liberal, Kans.....	3.67
" —.	16,	7500	Red Cloud, Neb... .	4.88
" 23.	17,	8439	Liberal, Kans.....	3.55
" 23.	18,	15042	"	4.36
" 27.	19,	8381	Thayer, Kans.....	3.89
M'ch 7.	20,	8598	Goddard, Kans.....	3.54
" 9.	21,	8448	Burton, Kans.....	3.56
" —.	22,	4262	Valley View, Tex....	2.40
" 11.	23,	11089	Benton, Kans.....	3.80
" 14.	24,	390	Liberal, Kans.....	2.94
" 15.	25,	8129	St. John, Kans.....	11.16
" 18.	26,	15021	Des Moines, Ia.....	3.22
" 22.	27,	1774	Salina, Kans.....	2.47
" 25.	28,	16543	Geuda Sp'gs, Kans..	4.01
" 27.	29,	3572	Valley View, Tex....	3.22
" 28.	30,	1330	Eistis, Neb....	3.33
Apr. 2.	31,	11994	Salina, Kans.....	4.39
" 4.	32,	2336	Liberal, Kans.....	3.20
" 7.	33,	9214	Ashton....	3.11
" 8.	34,	8112	Sullivan, Ill.....	2.83
" 10.	35,	9132	Hutchinson, Kans...	3.68
" 10.	36,	308	Kemington, Kans...	3.78

"	12.	37,	3128	Elkhardt, Ind.....	2.40
"	14.	38,	7935	Pratt, Kans.....	3.28
"	15.	39,	9618	Commerce, Tex.....	3.92
"	15.	40,	6738	Garden Plains, Kans.	3.53
"	21.	41,	206	" " .	3.66
"	22.	42,	6540	Salem, Ill.....	4.40
"	25.	43,	2660	Humphrey, Mo.....	3.35
"	26.	44,	188	Bonham, Tex.....	3.33
5					
Apr.	27.	No. 45,	car No. 20323	to Gainesville, Tex.....	5.41
"	28.	46,	11330	Humphrey, Tex.....	4.08
				Forward.....	$201.92
May	2.	47,	13081	to Liberal, Kans.....	3.18
"	5.	48,	164	Cherry, Kans.....	3.65
"	11.	49,	11572	Pratt, Kans	4.20
"	13.	50,	7240	Eureka.....	4.04
"	16.	51,	8093	Rockville, Neb.... .	3.53
"	17.	52,	12776	" "	4.00
"	24.	53,	7854	Arapahoe, Neb.....	3.84
"	24.	54,	9392	Liberal, Kans.....	3.46
June	3.	55,	8982	Edmund, Okla	4.13
"	6.	56,	7910	" "	3.55
"	7.	57,	2376	Rose, Kans.....	3.16
"	7.	58,	8718	Sanger, Tex.....	3.04
"	10.	59,	10656	Edmund, Okla.....	3.70
"	10.	60,	8884	Valley View, Tex....	3.51
"	12.	61,	10526	Mineral Wells, Tex..	16.96
"	—.	62,	10342	" " ..	23.91
"	13.	63,	10432	Marshall, Okla.....	3.05
"	14.	64,	7552	Mineral Wells, Tex..	24.42
"	15.	65,	8512	Edmund, Okla.....	3.48
"	5.	66,	10202	Commerce, Tex.....	4.09
"	23.	67,	10784	Centerville, Ia.....	3.54
"	24.	68,	10592	Edmund, Okla.....	3.16
"	29.	69,	8902	Columbus, Ind.....	3.23
July	1.	70,	1296	Liberal, Kans... ...	3.40
"	1.	71,	10988	Commerce, Tex.....	2.40
"	5.	72,	7888	St. Louis, Mo.....	2.79
"	7.	73,	9306	Pottsboro, Tex.....	2.75
"	14.	74,	15201	Flaglee, Colo.....	3.69
"	—.	75,	7366	Marshall, Tex.....	2.76
"	25.	76,	10264	Greenville, Tex.....	3.18
"	—.	77,	10400	Commerce, Tex.....	3.33
Sept.	5.	78,	6852	Putnam, Tex.....	3.54
"	6.	79,	10018	Commerce, Tex.....	3.89
"	6.	80,	7998	Pottsboro, Tex.....	2.28
"	12.	81,	15180	Quincy, Ill..	4.47
"	13.	82,	10668	Plano, Tex.....	2.40
"	16.	83,	11679	Flaglee, Col.....	1.12

Octo.	13.	84,	9216	Commerce, Tex.....	4.02
"	16.	85,	9530	" "	4.00
"	17.	86,	12694	Brazilton, Kans.....	3.71
"	19.	87,	7164	Barnes, Kans.....	3.40
"	—.	88,	1273	Ottawa.....	3.23
"	23.	89,	10321	Dowes.....	7.59
"	24.	90,	7373	Sabetta.....	3.33
"	26.	91,	7546	Burwell, Neb.....	3.55
"	26.	92,	13858	El Dorado, Kans....	2.92
				Forward.....	$416.50
"	26.	93,	6424	Williamsburg, Kans.	3.33
"	27.	94,	2304	Great Bend, Kans....	3.22
Nov.	1.	95,	8336	Herndon, Kans.....	3.82
"	3.	96,	4959	La Crosse, Kans.....	3.66
"	4.	97,	79	Natonia, Kans.....	2.03
"	6.	98,	15267	Osage City, Kans....	5.14
"	7.	99,	17221	Williamsburg, Kans.	4.01
"	8.	100,	9578	" "	2.84
"	13.	101,	3470	Putnam, Tex.....	4.00
"	14.	102,	9310	Brazilton, Kans.....	3.58
"	16.	103,	7965	Cotton Wood Furs..	3.70
"	22.	104,	409	Paris, Tex.....	3.11

6

Nov.	23.	No. 105,	car No. 13437	Coulterville, Ill.....	4.12
"	24.	106,	17622	Elkhart, Ind.	2.59
"	27.	107,	19946	Gordon, Tex.....	2.84
"	—.	108,	8484	Woodward, Okla....	2.65
"	—.	109,	5314	Ardmore, I. T.....	1.00
"	—.	110,	5300	Paris, Tex.....	3.16
"	29.	111,	8235	Kiowa, Kans.....	3.74
Dec.	8.	112,	7894	Durant, I. T.....	1.00
"	—.	113,	6987	Gordon, Tex.....	3.49
"	9.	114,	9641	Ennis, Tex.....	4.80
"	13.	115,	4352	Kopperl, Tex.....	2.60
"	—.	116,	15017	Roscoe.....	3.07
"	—.	117,	1366	"	2.92
"	13.	118,	10568	Hutchins, Tex.....	2.73
"	14.	119,	20908	Brazilton, Kans.....	2.64
"	—.	120,	16267	Leavenworth, Kans..	4.03
"	15.	121,	9050	Lemont, Ill.....	3.65
"	15.	122,	7552	Mahomet, Ills.....	3.40
"	16.	123,	7022	Gainesville, Tex.....	2.72
"	—.	124,	6052	Herene, Ills	2.85
"	—.	125,	5480	Caddo, I. T.....	2.55
"	19.	126,	18745	Paris, Tex.....	2.72
"	—.	127,	19258	" "	3.19
"	—.	128,	17794	" "	2.75
"	20.	129,	10628	Ennis, Tex.....	4.20
"	—.	130,	16115	Paris, Tex.....	3.25

"	22.	131,	9854	Ennis, Tex.....	3.51
"	20.	132,	9414	Hume, Ills.....	4.18
"	20.	133,	8952	Osgood, Ind.....	3.78
"	22.	134,	7274	Ennis, Tex.....	3.55
"	23.	135,	9258	Dunlap, Kans.....	1.87
"	—.	136,	480	La Cygree, Kans....	2.71
"	—.	137,	37601	Roscoe, Tex.....	3.80
"	28.	138,	5141	De Soto, Mo.....	3.48
				Am't forward...	$566.32
"	28.	139,	10490	Fairfield, Ills.....	3.67
"	29.	140,	7524	Wilmetto, Ills.....	2.47
"	30.	141,	13367	Potorac, Ills..... ...	3.42
"	—.	142,	12934	Chetopa, Kans.....	3.56
1894.		143,	9614	Garnett.....	3.38
Jan'y	6.	144,	9716	Osage City....	3.45
"	—.	145,	10424	Carmie, Ills.....	3.28
"	8.	146,	10048	Parsons, Kans.....	3.44
"	—.	147,	9048	Hume, Ill.....	3.34
"	9.	148,	13008	Kirkaid, Kans.....	3.57
"	10.	149,	8208	Bellevue, Tex.....	3.18
	—.	150,	3596	Detroit, Tex.....	3.23
"	—.	151,	10964	Guthrie, Okla... ...	2.76
"	12.	152,	7960	Bowie, Tex.....	2.66
"	13.	153,	9478	Ottawa, Kans.....	2.32
"	15.	154,	10268	Chicago, Ills.....	3.42
"	17.	155,	1754	Paris, Tex.....	4.20
"	—.	156,	7224	" "	2.68
"	18.	157,	6466	" "	3.03
"	19.	158,	8160	Winchester, Kans...	1.80
"	—.	159,	5900	Paris, Tex.....	2.80
"	22.	160,	9212	Carmie, Ills.....	3.98
"	23.	161,	8772	Gainesville, Tex.....	2.87
"	25.	162,	8722	Paris.....	2.83
"	—.	163,	10012	Osborne, Kans.....	4.03
"	27.	164,	10406	Commerce, Tex.....	3.08
"	—.	165,	7954	Sanger, Tex..... ..	2.73

7

Jan'y	29	No. 166, car	No. 6292	to Paris, Tex.....	3.65
"	30.	167,	6255	Gainesville, Tex....	3.33
"	—.	168,	11851	Aliceville, Kans.....	5.06
Feb'y	1.	169,	28314	Bunker Hill, Kans..	3.90
"	2.	170,	8578	Ardmore, I. T.....	3.01
"	—.	171,	10548 or 10584	Commerce, Tex.....	3.87
"	3.	172,	12439	De Soto, Mo...	3.79
"	10.	173,	10880	Lemont, Ills.....	3.20
"	10.	174,	6558	Homer, Ills....	3.31
"	14.	175,	12070	Portis, Kans.....	3.77
"	15.	176,	7960	Astoria Ills.....	3.68

"	16.	177,	9650	St. Anne, Ills.....	3.66
"	—.	178,	9702	Ottawa, Kans.....	3.62
"	17.	179,	9530	Natonia, Kans.....	3.29
"	20.	180,	8418	Paris, Tex.....	3.43
"	21.	181,	8058	Lamont, Ills..	2.76
"	21.	182,	10554	Windsor, Ills... ...	3.47
Feb	2.	183,	9556	St. Joseph, Mo.....	4.43
"	7.	184,	9254	Brighton, Ill.....	2.34
				Forward.....	$719.07
"	9.	185,	6088	Alva, Okla.....	3.69
"	8.	186,	8232	Dema, Ills.....	3.62
"	13.	187,	3316	Paris, Tex.....	3.77
"	10.	188,	2966	De Soto, Mo.....	2.91
"	—.	189,	1151	Osborne, Kans.....	3.90
"	14.	190,	8920	" "	3.71
"	15.	191,	4274	Paris, Tex.....	3.77
"	—.	192,	8322	Hoopeston, Ills.....	3.39
"	—.	193,	2641	Garnett, Kans.....	3.66
"	16.	194,	7293	Green Elder, Kans..	3.73
"	17.	195,	9972	Topeka, Kans... ..	3.13
"	17.	196,	9250	Alton, Kans.....	3.67
"	—.	197,	10114	Chesterfield, Kans...	3.17
"	21.	198,	6872	Kiowa, Kans.....	3.40
"	—.	199,	5410	Hoopeston, Ills.....	3.90
"	24.	200,	6923	Putnam, Tex.....	4.53
"	26.	201,	9974	Elmdale, Kans.....	3.25
"	27.	202,	8961	Levnardville, Kans..	4.14
"	—.	203,	8432	Areola, Ills.....	3.21
"	28.	204,	6978	Alva, Okla.....	5.39
"	30.	205,	1123	Freeport, Ills.....	4.10
"	—.	206,	5810	" "	3.27
"	—.	207,	13023	Levnardville, Kans..	2.88
"	31.	208,	5298	Hoopeston, Ill.....	3.54
"	—.	209,	6855	Kimmurdy, Ills.....	4.25
Mar.	2.	210,	11240	Chicago, Ills.....	4.27
"	3.	211,	251	Alton, Kans.....	3.28
"	4.	212,	6133	Papinia, Ills.....	3.62
"	5.	213,	320	Osborne, Kans.....	4.04
"	5.	214,	8848	Kiowa, Kans.....	4.18
"	—.	215,	5804	Mt. Cracken, Kans..	3.08
"	6.	216,	12578	Ottawa, Kans.....	3.29
"	7.	217,	3458	Williamsburg, Kans.	2.62
"	—.	218,	11471	Freeport, Ills.....	3.82
"	9.	219,	4820	Lenora, Kans.....	3.28
"	10.	220,	9530	Waverly, Kans.....	3.70
"	—.	221,	10652	Thayer, Kans.....	4.51
"	11.	222,	4804	Hume, Ills.....	4.05
"	—.	223,	7586	Edmond, Okla.....	3.38
"	12.	224,	12435	De Soto, Mo.... ...	3.81
"	13.	225,	10676	Lemont, Ills.....	3.33

"	14.	226,	9446	Commerce, Tex.....	7.15
"	—.	227,	8668	Great Bend, Kans...	3.93
8					
Apr.	14.	No. 228, car No.	9482	Norman, Okla.....	3.71
"	16.	229,	1091	St. Anne, Ills.....	2.96
				Forward.....	$887.06
"	20.	230,	3512	Ottawa, Kans.....	3.55
"	21.	231,	10860	Chicago, Ills.....	3.46
"	27.	232,	7156	Davis, I. T.....	3.31
"	—.	233,	9360	" "	3.44
May	4.	234,	8164	Waverly, Kans.....	3.66
"	—.	235,	11920	Osborne, Kans	3.50
"	7.	236,	5685	Chicago, Ills.....	4.31
"	—.	237,	8734	Plano, Tex.....	4.19
"	8.	238,	155	South Chicago, Ills..	6.99
"	9.	239,	8415	Osborne, Kans.....	4.02
"	—.	240,	7868	Easton, Ills.	3.92
"	—.	241,	10524	Osborne, Kans.....	4.78
"	15.	242,	10566	Garrett, Ills	3.69
"	17.	243,	70314	Columbus, Ohio.....	2.60
"	—.	244,	2610	Thayer, Kans.....	3.30
"	—.	245,	9614	Virginia, Ills.....	3.13
"	—.	246,	6261	Chicago, Ills.....	4.77
"	25.	247,	9713	El Dorado, Kans....	1.46
"	—.	248,	13283	Waverly, Kans.....	3.66
"	28.	249,	15034	" "	3.53
"	—.	250,	2540	Garrett, Kans.....	3.30
"	—.	251,	10936	Topeka, Kans.....	4.46
June	7.	252,	10350	Lerna, Ills.....	3.45
"	16.	253,	9478	Hume, Ills.....	4.05
"	18.	254,	389	Thayer, Kans.....	3.01
July	12.	255,	7166	Wilmeeta, Ills.....	3.55
"	24.	256,	9466	Commerce, Tex.....	3.91
"	25.	257,	9092	Germantown	3.81
"	27.	258,	10418	Osborne, Kans.....	2.61
"	28.	259,	12293	Windsor, Ills.....	2.44
"	28.	260,	8341	Kompton, Ills.....	2.49
"	30.	261,	60500	Kimmundy, Ills...	3.79
"	31.	262,	9224	Osborne, Kans.....	3.66
Aug.	8.	263,	7780	Plano, Tex.....	3.34
"	—.	264,	7164	Lerna, Ills.....	3.52
"	18.	265,	10180	Hume, Ills.	2.59
"	—.	266,	10354	" "	4.11
"	20.	267,	10954	" "	3.37
"	24.	268,	7128	Plano, Tex.	3.59
Sept.	4.	269,	4992	Abilene, Tex.....	3.70
"	5.	270,	6052	Commerce, Tex.....	3.55
"	—.	271,	7114	Ottawa, Kans.....	3.62

"	6.	272,	8654	Germantown, Ill....	3.79
"	—.	273,	3780	Armarilla, Tex.....	3.31
"	—.	274,	11083	Lerna, Ills	3.32
				Forward.....	$1,048.67
"	7.	275,	9325	Chesterfield, Ills....	3.11
"	11.	276,	1646	Duncan, I. T.....	3.33
"	12.	277,	7856	Kimmundy, Ills....	4.35
"	13.	278,	130	Ottawa, Kans.....	4.86
"	24.	279,	15220	" "	3.35
"	—.	280,	10060	Hume, Ills.....	4.37
"	28.	281,	7942	Greenville, Tex... .	3.29
Octo.	2.	282,	8536	" "	2.75
"	3.	283,	7660	Commerce, Tex.....	3.16
"	—.	284,	8116	" "	3.45
"	8.	285,	10176	Perry, Okla.....	3.46
"	9.	286,	16945	Hume, Ills...	3.05
"	10.	287,	9350	Munster, Tex... ...	4.25
9					
Octo.	11.	No. 288, car No.	2327	Blossom Prairie, Tex.	3.45
"	12.	289,	2356	Bonham, Tex.....	4.30
"	—.	290,	8384	Denison, Tex.....,	8.44
"	16.	291,	5781	Fort Worth, Tex....	3.04
"	17.	292,	7866	Kimmundy, Ills....	3.38
"	—.	293,	8428	Greenville, Tex.....	3.34
"	18.	294,	5731	Denison, Tex... ..	2.79
"	20.	295,	10350	Hume, Ills.....	3.67
"	20.	296,	10728	Lerna, Ills.....	3.19
"	22.	297,	7457	Savoy, Tex.....	3.23
"	25.	298,	8943	London, Canada....	3.93
"	29.	299,	10388	Celeste, Tex.....	3.06
Nov.	3.	300,	8680	Ben Franklin, Tex..	3.72
"	7.	301,	1394	Gainesville, Tex.....	3.71
"	8.	302,	1357	Honey Grove.....	2.71
"	9.	303,	10301	" "	3.61
"	—.	304,	9600	Windom.....	4.08
"	15.	305,	15409	Savoy	3.60
"	16.	306,	9685	Terrell.....	5.11
"	15.	307,	15261	Sherman.....	3.50
"	16.	308,	6274	Roxton.....	2.73
"	—.	309,	6137	Sherman.....	2.82
"	17.	310,	5614	"	2.49
"	19.	311,	2329	Chetopa, Kans.....	3.70
"	21.	312,	7526	Shipman, Ills.....	3.10
"	—.	313,	156	Kiowa, Kans.....	3.43
"	22.	314,	5636	Beville, Tex.....	2.96
"	23.	315,	7860	St. Louis, Mo.....	3.72
"	24.	316,	12130	Kiowa, Kans.....	3.95
"	—.	317,	9366	Commerce, Tex.....	3.24

"	—.	318,	7306	Humboldt, Kans....	3.24
"	—.	319,	9518	Kiowa, Kans.....	2.92
				Forward.....	$1,209.69
Nov.	27.	320,	9906	Germantown, Ills....	3.85
"	28.	321,	707	St. Louis, Mo.....	3.14
"	28.	322,	4343	" "	3.39
"	30.	323,	5405	St. Anne, Ills.....	2.88
"	—.	324,	11205	Germantown, Ills....	3.94
Dec.	5.	325,	8178	St. Louis, Mo.....	3.84
"	6.	326,	7162	Commerce, Tex.....	3.60
"	—.	327,	9471	Winchester, Kans...	3.66
"	7.	328,	10528	Highland Park, Ills.	3.82
"	10.	329,	13124	Brighton, Ills.....	3.84
"	11.	330,	3046	Lerna, Ills.....	2.86
"	14.	331,	11686	Celeste, Tex.....	2.78
"	14.	332,	4014	Roxton, Tex.....	3.26
"	14.	333,	10749	Temple, Tex.....	3.68
"	—.	334,	6860	Mirkle, Tex.....	3.44
"	15.	335,	9406	St. Louis, Mo.....	3.53
"	—.	336,	6041	Blossom, Tex.....	3.76
"	17.	337,	1591	Sherman, Tex.....	3.24
"	19.	338,	792	Pecan Gap, Tex.....	2.84
"	—.	339,	51178	" "	3.24
"	—.	340,	4552	St. Louis, Mo.....	3.74
"	21.	341,	7373	Vernon, Ills.....	3.00
"	—.	342,	15211	Smithton, Mo.....	4.38
"	22.	343,	7948	Ben Franklin, Tex..	4.71
"	—.	344,	7666	Pecan Gap, Tex.....	2.79
"	24.	345,	4955	St. Louis, Mo.....	3.40
"	27.	346,	4508	Hume, Ills.....	3.85
					$1,304.15

(Summons issued Dec. 26, 1895. Served Dec. 26, 1895.)

10 In Little River Circuit Court.

A. J. KIZER, Plaintiff,
vs.
THE TEXARKANA & FORT SMITH RAILWAY COMPANY, Defendant.

Amendment to Complaint.

Plaintiff, for an amendment to his complaint filed in this cause, says that in addition to the overcharges made by the defendant against the plaintiff on the shipment of lumber under the contract set forth and named in his said complaint defendant during the year 1895 made other overcharges against *defendant* in violation of said contract on shipments of lumber from said station of Rankin.

That said overcharges number one hundred and forty-six (146)

and amount to the sum of five hundred and sixty-six $\frac{23}{100}$ ($566 23) dollars, the particulars of which are set forth in the itemized account herewith filed as Exhibit "A" to this amendment to plaintiff's complaint, no part of which said overcharges has ever been paid, though plaintiff has often requested defendant to pay the same.

Wherefore plaintiff prays judgment against the defendant as in his original complaint, and for the further sum of five hundred and sixty-six $\frac{23}{100}$ dollars due as herein set forth, and for other relief.

SCOTT & JONES,
Att'ys for Plaintiff.

11 (EXHIBIT.)

1895.

No. 347.	Car No.	236	1/3	Savoy, Tex	$3.28
348.		9450	"	Commerce, Tex	4.23
349.		9964	"	Pecan Gap, Tex	3.03
350.		10738	1/4	Roxton, Tex	3.78
351.		7166	1/8	" "	3.28
352.		7194	"	Ben Franklin, Tex	3.47
353.		10600	1/10	Chesterfield, Ills	3.64
354.		11625	1/14	Pecan Gap, Tex	2.40
355.		5786	1/17	Beeville, Tex	3.04
356.		6432	"	Savoy, Tex	3.57
357.		9670	1/21	Pecan Gap, Tex	3.63
358.		4190	1/23	Temple, Tex	3.48
359.		5878	1/24	Roxton, Tex	3 88
360.		8144	1/25	Ben Franklin, Tex	3.34
361.		9172	2/4	Commerce, Tex	3.15
362.		9030	2/5	Mt. Calm, Tex	3.82
363.		8914	"	Sherman, Tex	3.22
364.		13081	"	Hume, Ills	4.13
365.		6509	"	Savoy, Tex	3.71
366.		7058	2/6	Roxton, Tex	3.34
367.		12242	"	De Soto, Mo	3.60
368.		6240	2/9	Cameron, Tex	2.78
369.		11004	"	Hume, Ills	4.82
370.		7956	"	Roxton, Tex	3.04
371.		12431	2/12	De Soto, Mo	3.00
372.		6366	2/13	Belleville, Ills	3.52
373.		10596	"	Ben Franklin, Tex	4.43
374.		8884	2/14	Hammansville, Mo	3.74
375.		5889	2/15	Montrose, Ia	4.76
376.		8812	"	Hume, Ills	4.32
377.		7394	"	Nelson, Mo	2.97
378.		8324	2/16	Ben Franklin, Tex	3.67
379.		10890	2/18	Miami, Tex	4.90
380.		7242	"	Temple, Tex	3.91
381.		8352	2/19	St. Louis, Mo	5.80
382.		13132	2/21	Bitler, Mo	4.76
383.		8378	"	Lema, Ills	3.43

384.		9340	"	Miami, Tex.....	3.60
385.		8452	2/22	Hume, Ills.....	3.50
386.		6608	"	Sherman, Tex....	3.36
387.		9756	"	Denison, Tex.....	3.44
388.		9750	2/25	Mineral Wells, Tex.....	2.81
389.		3694	"	Abiline, Tex.....	2.55
390.		7384	2/27	Denison, Tex.....	3.42
391.		6856	3/4	Savoy, Tex...	3.83
392.		8436	3/5	Rogers Park, Ills.....	2.64
393.		9170	"	Ben Franklin, Tex.....	3.83
394.		14174	3/9	Hume, Ills.....	4.05
395.		7306	"	Freburry, Ills....	3.60
396.		5934	3/12	Coal City, Ills.....	4.00
397.		9586	"	" "	3.92
398.		9952	3/13	Havana, Ills.....	4.16
399.		8274	3/19	Beeville, Tex.....	3.26
400.		6234	3/20	Denison, Tex.....	4.41
401.		11143	3/21	De Soto, Mo.....	3.88
402.		10672	3/22	Pottsboro, Tex.....	4.01
403.		9518	3/23	Hume, Ills.....	3.90
404.		9689	3/25	Huntsville, Ills.....	4.12
405.		9201	3/26	Lema, Ills.....	4.10
406.		11717	3/27	Hume, Ills....	4.49
407.		8540	3/28	Slater, Mo...	4.20
408.		7086	"	Ben Franklin, Tex	3.15
409.		8094	"	Coal City, Ills.....	3.44

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No. 410.	Car No.	7626	3/28	Coal City, Ills.....	3.29
411.		4072	4/1	Blossom, Tex.....	5.15
412.		15388	"	Lema, Ills..... ...	3.56
413.		7776	"	Coal City, Ills.....	2.93
414.		8863	4/2	Briknell, Ind	7.05
415.		15298	4/3	De Soto, Mo..	4.08
416.		11236	4/5	Easton, Ills....	9.22
417.		13471	4/5	La Grange, Mo.....	3.65
418.		11004	4/5	Hutsonville, Ills...	4.51
419.		7400	"	Germantown, Ills.....	4.75
420.		7804	4/9	Freebury, Ills.....	4.40
421.		7010	4/10	Maquon, Ills	7.42
422.		9118	4/12	Pecan Gap, Tex.....	3.14
423.		15375	"	De Soto, Mo...	3.50
424.		7236	4/13	Freebury, Ills.....	3.56
425.		9820	"	Havana, Ills.....	3.29
426.		3630	4/17	St. Louis, Mo	6.04
427.		8330	4/22	Freebury, Ills.....	5.08
428.		4100	5/7	Blossom, Tex.....	8.26
429.		9297	5/24	Freebury, Ills.....	7.72
430.		4496	7/23	Detroit, Tex...	6.84
431.		5671	"	Freebury, Ills.....	5.66
432.		3662	8/9	Blossom, Tex.....	6.42

433.	4446	9/6	Pottsboro, Tex..... ..	7.33
434.	10096	9/6	Grapevine, Tex..... ...	3.94
435.	11629	"	Freebury, Ills....	16.96
436.	10836	9/17	Grapevine, Tex.....	3.16
437.	720	9/21	Braidwood, Ills.....	2.56
438.	8208	10/8	Paris, Tex.....	6.75
439.	7128	10/9	" "	5.45
440.	4486	"	" "	7.70
441.	12879	10/12	Freebury, Ills.....	15.71
442.	10246	10/19	Butler, Mo.....	7.56
443.	8574	10/25	Topeka, Kans.....	11.67
444.	10542	10/28	Ottawa, Kans.....	9.12
445.	10786	10/29	Burton, Kans.....	6.88
446.	8452	11/2	Crocker, Mo.....	6.82
447.	4916	"	Pottsboro, Tex.....	7.18
448.	6270	11/4	Santa Anna, Tex.....	5.39
449.	3356	11/6	Denison, Tex.....	6.44
450.	10179	11/7	Freebury, Ills.....	5.95
451.	9820	11/16	Commerce, Tex.....	7.81
452.	3886	11/18	Krum, Tex.	7.88
453.	5953	11/21	Commerce, Tex....	6.00
454.	10818	11/29	" "	6.54
455.	6530	11/30	Pottsboro, Tex.....	6.17
456.	8760	12/3	Ben Franklin, Tex.....	8.50
457.	5702	"	" " "	4.91
458.	8166	12/5	Commerce, Tex.... ...	7.10
459.	6550	12/10	Denison, Tex.....	4.80
460.	2760	"	Commerce, Tex.....	5.98
461.	661	12/13	" "	6.61
462.	7524	12/16	" "	5.30

13 *Answer.*

In the Little River Circuit Court.

A. J. KIZER, Plaintiff,
vs.
TEXARKANA & FT. SMITH R. R. Co., Defendant.

Defendant — that it executed the written contract alleged by plaintiff and attached to his complaint as Exhibit "A," and says such contract is not and was not its act and deed, and now here interposes its plea of *non est factum* against the same.

Defendant denies that it has overcharged the plaintiff upon his said shipments in the sum of 2 cents per hundred or in the aggregate sum of one thousand three hundred and four dollars and fifteen-one-hundredths dollars ($1,304.15), as alleged by the plaintiff, or in any other amount. Defendant avers that it never charged plaintiff anything except the usual customary and reasonable rates upon shipments made by him, and says it is not indebted to the plaintiff in any amount.

Defendant further avers that if said Whittaker ever executed said contract, it was without authority from this defendant or its board of directors and was an *ultra vires* and illegal act on the part of said Whittaker; that the rate mentioned in said contract was less than the established and reasonable regular rates charged by the defendant for similar services; that defendant's regular tariff rates were and are in all respects reasonable, and the rate mentioned in the alleged contract was unreasonable and would constitute an unlawful discrimination against the rest of the public; that all of said traffic was interstate commerce, and said contract, if ever executed, was and is void and incapable of enforcement.

Wherefore defendants pray for judgment and for costs and other relief.

HUDGINS & ESTES,
Def't's Att'ys.

14 W. A. Williams, being duly sworn, states on oath that he believes the averments of the foregoing answer to be true, and that affiant is the general manager and authorized agent of said defendant.

W. A. WILLIAMS.

Sworn to and subscribed to before me this 6th day of January, 1896.

[SEAL.] J. M. JOHNSON, *N. P.*

My com. expires Dec. 9, 1896.

15 (*Amended Answer.*)

In the Circuit Court of Little River County, Arkansas.

A. J. KIZER, Plaintiff,
vs.
THE TEXARKANA & FT. SMITH RAILWAY CO., Defendant.

(Amendment to answer.)

The defendant for an amendment to its answer filed herein avers as follows: The defendant's line of railway between Rankin and Texarkana is an interstate line of road, its portion north of Red river is situated in Little River county, Arkansas, and the portion south of Red river in Bowie county, Texas, and all shipments of freight from Rankin to Texarkana are interstate commerce.

Defendant denies that it demanded or plaintiff paid it any amount whatever by reason of shipments mentioned in the original or amended complaint, except what was justly and legally due the defendant.

The alleged contract sued upon by the plaintiff was never executed by the party of the second part, and plaintiff failed and refused to construct or maintain his saw-mill within a reasonable time after

the date of the alleged agreement, whereby the defendant is under no obligation to plaintiff by reason of said instrument.

Upon the establishment of plaintiff's said saw-mill, plaintiff became and ever since has been the regular local and freight agent for the defendant at said Rankin, and did himself voluntarily bill out the shipments complained about, and did voluntarily accept and pay the rates at which he himself as such agent of defendant made such shipments, and voluntarily continued to do so during all of said time, and is thereby estopped from asserting his complaint as to said alleged overcharges, and his alleged contract or agreement is void.

16 Should the alleged contract be construed to be binding upon the defendant, then the defendant says the average charges made by it for all of plaintiff's shipments over the defendant's line were not in excess of the rate mentioned in the pretended contract.

For all of which in addition to the denials and averments of the original answer herein, plaintiff is not entitled to recover, and the defendant prays for judgment, for costs, and all other relief.

HUDGINS & ESTES,
Attorneys for Defendant.

17 A. J. KIZER, Plaintiff,
vs.
TEXARKANA & FT. SMITH R'Y CO., Defendant. } Plea to Jurisdiction.

Now comes the defendant and shows that this court hath not jurisdiction to hear and determine this cause, because each item of overcharge alleged and claimed by plaintiff is for a separate breach of contract, is a separate cause of action, and none of such items are of amount sufficient for this court to entertain jurisdiction thereof. Wherefore defendant prays that this plea be sustained, and that this cause be dismissed.

HUDGINS & ESTES,
Def't's Att'ys.

Demurrer.

In the Circuit Court of Little River County.

A. J. KIZER, Plaintiff,
vs.
TEXARKANA & FT. SMITH RAILROAD CO., Defendant. }

Now comes the defendant and demurs to plaintiff's complaint, and says that it appears on the face of the same that said complaint does not state facts sufficient to constitute a cause of action, of which the defendant prays judgment.

HUDGINS & ESTES,
Defendant's Attorneys.

For further objection to the complaint defendant shows that the same is not sufficiently specific in the following respects, among

others: It does not show that the alleged overcharges occurred on defendant's line of railway or were demanded or collected by it, and does not show how or where such alleged overcharges did occur, and does not show the particular freight rate or rates charged or collected by the defendant or the weights involved in each item of shipment. Wherefore the defendant excepts to the complaint for these reasons and prays that the plaintiff be required to
18 plead specifically in each of these respects.

HUDGINS & ESTES,
Defendant's Attorneys.

In the Little River circuit court, at its Jan'y term, Jan'y 7, 1896, the following proceedings, among others, were had, to wit:

A. J. KIZER
vs.
TEXA. & FT. SMITH R'Y CO. } Demurrer and Answer Filed.

Comes defendant by attorneys and files its demurrer, and also its answer to plaintiff's complaint.

At the Jan'y term, Jan'y 15, 1896, the following proceedings were had herein, to wit:

A. J. KIZER
vs.
TEXA. & FT. SMITH R'Y CO. } # 419. Am'd Complaint, etc.

Comes the plaintiff, by attorney, and asks and obtains leave to file his amended complaint herein, and by consent of parties it is ordered that this cause be continued and set for Tuesday of 1st week of next term.

At the July term, July 15, 1896, the following proceedings, among others, were had, to wit:

A. J. KIZER
vs.
TEXARKANA & FT. SMITH RAILWAY COMPANY. } # 419. Judgment.

This day, this cause coming on to be heard, came the parties plaintiff and defendant in person and by attorneys, and by oral consent, made in open court and hereby entered on the record, waived a trial by jury and submitted the issues of law and
19 fact to be determined by the court, and the court, after having heard all the evidence introduced by either party, and having heard the argument of counsel and being advised as to the law, doth find the law and the facts in favor of defendant.

It is therefore ordered, adjudged, and decreed that the plaintiff, A. J. Kizer, shall take nothing by reason of this suit, and that the defendant, The Texarkana & Ft. Smith Railway Company, do have and recover of and from the said plaintiff all the costs incurred in this suit, for which let execution issue.

July term, July 17, 1896, the following proceedings were had herein, to wit:

A. J. KIZER
vs.
TEXARKANA & FT. SMITH R'Y CO. } # 419. Mot.

Come the parties, by their attorneys, and comes the plaintiff and files his motion for a new trial in this cause, and upon examination of said motion the court is of the opinion that the same should be overruled.

It is therefore considered and ordered that the motion for a new trial be overruled, to which judgment and ruling the plaintiff at the time excepted.

And at the request of the plaintiff the court files written findings of the law and facts, and the plaintiff is allowed 60 days in which to file his bill of exceptions herein.

(Signed at end of each day's proceedings.)

W. P. FEAZEL, *Judge.*

20 *Bill of Exceptions in the Little River Circuit Court.*

To the July Term, 1896.

A. J. KIZER, Plaintiff,
vs.
THE TEXARKANA & FT. SMITH R'Y CO., Defendant. } No. 419. Law.

Be it remembered that this cause coming on for trial this 14th day of July, A. D. 1896, before a jury duly empanneled and sworn, the plaintiff, in order to sustain his cause of action, introduced the following testimony, to wit:

A. J. KIZER, plaintiff, in his own behalf testified:

I reside at Texarkana, Texas. I know W. L. Whittaker. In 1891 he was considered as the president and general manager of the Texarkana & Ft. Smith railroad. On September 16th, 1891, I entered into a contract with him, which contract I now have in my hand and identify as the same contract made with Whitaker.

Plaintiff here offered in evidence the contract referred to; to which the defendant objected, because it is variant from the contract declared upon, in that it does not obligate the party of the first part, and because not executed by the party of 2nd part; which objection was by the court overruled; to which action and ruling of the court the defendant then and there excepted. The contract is as follows:

THE STATE OF TEXAS, }
Bowie County. }

TEXARKANA, TEXAS, *Sept. 16th*, 1891.

This agreement, by and between W. L. Whitaker as president, manager and owner of the Texarkana & Ft. Smith railway and for

and on behalf of the Texarkana & Ft. Smith Railway Company of the first part, and A. J. Kizer, for himself and his associates, heirs, successors and assigns, of the second part, witnesseth:

1. That the party of the second part individually or asso-
21 ciated with others in partnership or incorporation as he may elect agrees to construct and maintain a saw-mill in Little River county on the line of said railway for the manufacture of pine, oak and other kinds of lumber, at a point already selected by the party of the 2nd part.

2. That the party of the 2nd part agrees in consideration of the foregoing and for and in behalf of said railway and said company, to furnish cars and ship all lumber manufactured by the said mill for the said party of the 2nd part and for his heirs successors and assigns of said mill over all routes over which lumber is usually shipped from Texarkana, Texas and Ark., at a rate not to exceed two cents per hundred pounds over the rates charged by the different railway companies from Texarkana.

This contract to be in force until January 1st, eighteen hundred and ninety-seven (1897) A. D.

(Signed) TEXARKANA & FT. SMITH R'Y CO.,
[SEAL.] By W. L. WHITAKER, *Pres't.*

Q. State to the jury what led up to the execution of that contract.

A. Whitaker approached me and wanted to know where I was going to locate my mill, and I told him that I had no place in view. He wanted to know why I did not go over on his road, and I stated that if I had inducements probably I would. He gave me his ideas about the pine timber. I spoke to him about the rates, and he said he did not know what they would be. In the meantime I got to talking with other parties, and they wanted to go in with me. These parties were (and are today) directors in the railroad company, and they asked Whitaker if he could give me this contract for 2 cents over the rate from Texarkana, Arkansas, and Texas, and the other parties who were going in with me asked Whitaker if he would give a contract to that effect. I was not present at that time. He afterwards executed this contract.

Q. In whose hands or possession was that contract placed?
22 A. In the hands of William Buchanan, one of the directors of the Texarkana & Ft. Smith railroad.

Q. You stated that two of the directors of the road contemplated going in with you at that time?

A. Yes, sir; neither of them ever went in with me. This contract was made solely on behalf of myself, and I am the only one interested in it.

Q. How far from Rankin was the end of the road at the time this contract was made?

A. I could not tell exactly; my impression is that it had not crossed the river; it had not reached Rankin.

Q. State whether the railroad company had established any tariff rates from Rankin to Texarkana at that time.

A. No, sir; if they had I never saw it. The first rate ever established was November 30th, 1892—that is, lumber tariff.

Q. After you made this contract what did you do?

A. I purchased land in this county to the extent of some 10,000 or 12,000 acres.

Q. How long after the road got to Rankin before you shipped your mill?

A. As soon as they got to Rankin.

Q. What is the capacity of that mill?

A. 35,000 feet per day.

Q. When did you begin to manufacture lumber there?

A. I think about the middle of January, 1892.

Q. Was that as soon as you got your mill established and in running order?

A. Yes, sir.

Q. About what was you- average output at the mill?

A. Between 550,000 and 600,000 feet per month.

Q. Did you ship any lumber prior to the establishment of the freight tariff that you speak of, November, 1892?

23 A. Yes, sir.

Q. What rates had they charged you prior to that time?

A. 2 cents, I think—that is, 2 cents above the Texarkana rate. This 2 cents is what we call an "arbitrary" of 2 cents. For illustration: If the rate from Texarkana to St. Louis is 15 cents, the rate from Rankin to St. Louis would be 2 cents more.

Q. When they first began to charge you in excess of 2 cents over Texarkana rates, did you make any objections?

A. Yes, sir; I notified them by letter, of which this is an identical copy, letter for letter, and is dated December 29th, 1892. I believe I sent this letter to Mr. Whitaker and Mr. Williams; don't know whether I gave it to them or sent it to them.

Witness here identifies the copy of the letter, and the same is read to the jury, as follows:

RANKIN, ARKS., *Dec. 29th*, 1892.

A. J. Kizer, manufacturer and wholesale dealer in rough and dressed lumber, telegraph and express office, Rankin, Arkansas.

W. L. Whitaker, prest. T. & Ft. S. R'y Co.:

I today have returns on car # 12076, shipped by me on the 12th of Dec., 1892, from Rankin, Ark., to Mulhall, O. T., same showing rate charged 30½ cents per hundred pounds from Rankin, Ark., to Mulhall, O. T., which is 3 cents per hundred pounds over and above Texarkana rate. I beg to call your attention to my contract, dated Sept. 16th, '91, signed T. & Ft. S. R'y Co., by W. L. Whitaker, prest., wherein said contract guarantees me that my rate shall not exceed 2 cents per hundred pounds above Texarkana rate. This is to give you notice that car # 12076, as above consigned, is overcharged 1 cent per hundred pounds in rate over above-mentioned contract, and this car and all future shipments showing an over-

charge in rates, as per contract above mentioned, are shipped
24 by me under protest. Witnesseth my hand this the twenty-
ninth (29) day of Dec., A. D. eighteen hundred and ninety-
two.

(Signed) A. J. KIZER.

Q. Did they reply to that letter?

A. I do not think they did; I have no recollection of it.

Q. Did you ever have any conversation with Whitaker or Williams with reference to this overcharge?

A. I think so; several times probably, in a laughing, jesting way. I have no recollection of any particular time when I spoke to them. I relied upon this letter.

Q. State whether you made out or assigned in making out this exhibit showing the number of cars shipped and amount of overcharge.

A. I assisted Mr. Davis in making it.

Q. Have you the original expense bills paid by you or your consignees for the lumber?

A. I have.

Q. When lumber is shipped, would the charges be paid at destination—is it delivered until charges are paid?

A. The charges are paid at destination at the time of delivery.

Q. Explain to the jury the manner in which the shipment is made and the process through which it goes.

A. This expense bill covers car No. 8552, shipped Jan'y 12th, 1893.

By ATTORNEY FOR DEFENDANT:

Q. Have you bills of lading covering these shipments?

A. I have no bills of lading; have the expense bills. I issued no bills of lading, as I was the agent, and the books of this station are in my possession.

Q. How do you arrive at the weights of these cars?

A. My records did not show the weights of the cars at that time. At the time the shipments were made, in 1893, this road had no track-scales, and they had to accept the expense-bill weights as furnished by the other roads, as if I shipped a car from Ran-
25 kin to Chicago, routed by the St. Louis Southwestern, the Texarkana & Ft. Smith, R. C. would haul it to Texarkana and deliver it over to the Cotton Belt, and they would weigh it, and the Ft. Smith accepted the weight of the other roads. I got hold of the weights from the expense bills.

The defendant objects to the testimony taken from what the expense bill shows, because there is better evidence obtainable in possession of the witness, which objection was by the court overruled, and defendant then and there excepted to the ruling of the court.

By Pl'ff's Atty:

Q. Describe the method of shipment of these cars from Rankin.
A. Take for illustration this item of Jan'y 12th, 1893, car # 8552, rom Rankin to La Junta, Col., I, as agent at Rankin, could only ill that car to Texarkana, the destination on my waybill being ankin to Texarkana, ultimate destination La Junta, Col., and on rrival at Texarkana the agent there takes up my waybill and nakes up another waybill for destination, and after receiving the eights from connecting roads he attaches his charge for the haul f the car from Rankin to Texarkana for the Texarkana & Ft. mith railroad, which charges follow the shipment to the point of estination. When the car arrived at destination the agent at that oint would add up the whole charges and the consignee of the car, o whom I had shipped the lumber, would pay all the charges. I ade out no bills of lading for myself because I was agent there, nd could have made them whenever I considered it necessary. he bill of lading is issued for the shipper, the waybill is for the outing of the car. I have the expense bills for these cars here, nd also the tariff sheets showing the rates in force over the roads andling these cars. A waybill is the routing of the car, nothing ore nor less than an order for the car to go from one place to nother. It is placed in the hands of the conductor who takes it to Texarkana, where it is taken up by the agent of the Texarkana & Ft. Smith road. The expense bill shows the amount of charges on a car from the point of shipment to destination.
Q. Read that expense bill to the jury.
A.—

(10) 177.

R. W. Eng. Lbr. Co.

La Junta Station, ——, 189–.

Pro. No. —. E. B. No. 478.

Received from Atchison, Topeka & Santa Fe Railroad Company e following-described property from Ft. Worth station.
Situated on the —— R. R.
Consignor, T. & F. S. R'y, Rankin.
A. J. K., transfer.
Enter above full reference, as given in consignor column of way-ll.

Billing.	Articles.	Weight.	Rate.	Freight.	Advanced charges.
te of bill: 1, 4, 893. of W. B.: F. 2. ose car: S. W. o. 8552.	Lumber.	37900	35	132.15	11.37 Entered. Cartage..... Total charges, $144.02

In good order (or condition noted).
Agent will require consignee to date this receipt.
1, 26, 1893.

W. C. FULLER, *Agent.*

Defendant objects to the introduction of this bill because it seems to be a receipt executed by or on a blank of the Atchison, Topeka & Santa Fe railroad, at La Junta station, and is not signed by the defendant and execution not proven, and is not the best evidence of the weights or amounts charged; which objection is by the court overruled, and the defendant then and there excepted.

Q. Turn to the number of the car that corresponds with that receipt in your hands, in this list attached to complaint.

A. It is No. 452, and here is the expense bill showing T. & P. car # 3880, shipped from Rankin on the 18th day of November, 1895, to Krum, Texas; this expense bill shows that I paid for 34,000 pounds, amounting to $82.56, which was paid for me by the
27 man to whom I shipped the lumber. I sold him the lumber delivered, and he paid that amount and sent me the expense bill, and I gave him credit for it on the car of lumber. I figured the excess by taking the 34,000 pounds at 22 cents rate, which amounts to $75.68, which makes an overcharge of $7.8. My authority for this rate is T. & P. tariff 1726*h*, effective October 3rd, 1892.

Q. Is that tariff rate referred to in this expense bill?

A. Yes, sir.

Q. State what is the tariff rate on a car of lumber from Texarkana to Krum, Texas.

A. 20 cents per hundred.

Q. What is the rate charged here from Rankin to Krum?

A. I haven't figured it out. It ought to be 34,000 pounds at 22 cents a hundred, which would be $75.68. They charged me $82.56, as shown by the expense bill.

Q. State if this is the method by which you arrived at the amount of the overcharges.

A. Yes, sir. This tariff shows only 20 cents rate from Texarkana to Krum, and I make the overcharge on the basis of this contract. In other words, I deduct the tariff rate from Texarkana to destination and then add the 2 cents per hundred, as provided by this contract, and take that as the rate I ought to have paid.

Q. You have attached to your complaint and amended complaint 462 overcharges; state if you have the expense bills for each of these overcharges.

A. I am not positive on that point. There may be a few expense bills in the possession of the Texarkana & Ft. Smith railroad.

Q. Have you a statement made from the expense bills for each overcharge in these complaint-.

A. I have. They are — the same character and description as the one I have read to the jury.

Q. Is that statement correct?

28 A. I am liable to have made an error in calculation in the amount of the overcharge.

Q. Have you the tariff rate on each car on which you claim overcharge from Texarkana to destination?

A. To the best of my knowledge I have.

Plaintiff offers to counsel for defendant, and exhibits in court to be used in evidence by either party, the expense bill corresponding with each car numbered and named in the complaint and amendment, and also the tariff sheets showing the tariff on lumber from Texarkana to point of destination for each shipment mentioned in the complaint and in the amended complaint, which tariff sheets are subject to inspection by counsel for defendant, and to be used in evidence by either side.

The defendant objects to the introduction of these papers as evidence because they do not appear to have been executed by this defendant, their execution is not proven, and they are not the best evidence of the facts contained therein; which objection was by the court overruled, and the defendant then and there excepted to the ruling of the court. Defendant waived the reading of these expense bills and tariff sheets in evidence and agreed that for the purpose of this trial they should be considered in evidence in support of plaintiff's demand to be used by either plaintiff or defendant, subject to the above objections.

Q. In making this calculation for each car mentioned in the complaints and exhibits, state whether you used the public tariff sheets then in force on the roads over which the lumber was shipped from Texarkana to point of destination.

A. I did.

Q. And then you added to that rate 2 cents?

A. Not on all of them; on some of the shipments we had Texarkana rates from Rankin.

29 Q. On all the shipments mentioned in the complaints you figured the tariff rate as shown by the tariff sheets in force from Texarkana to destination and then added 2 cents from Rankin to Texarkana?

A. Yes, sir.

Q. Examine the book I now present you and state from what source these calculations are made.

A. Made from the tariff rates and the contract and expense bills.

Q. You say at the time covered by the contract and the shipments sued for the Texarkana & Ft. Smith railroad had no scales at Texarkana?

A. I do not know exactly when they did put them in. There was quite a while they had no scales.

Q. At any rate, the weight in these expense bills are recognized by all railroads and everybody that handles the car?

A. Yes, sir.

Plaintiff here offers the calculations made in the book, showing number, weight of cars, rate, destination, etc., and witness reads to

the jury the memorandum in book as to item No. 366, with expense bill covering said item and rate sheet showing rate in force from Texarkana to destination of car, shown in St. Louis Southwestern Railway tariff 26 HX as 13¾ cents, and adding the 2 cents arbitrary on the Texarkana & Ft. Smith railroad would make the rate from Rankin to point of destination 15¾ cents, while the expense bill shows that the charge was 16¾ cents. The entry on the book is as follows:

452. Car 3886.

NOV. 18TH, 1895.

E. bill paid 34400 # $82.56
Should be 34400 # A 22c. 75.68

7.88

Authority T. & P., # 1726–4.. 20c.
Tex. — Ft. S. 02
22c.

Expense bill reads as follows:

(11) 279.

Jackson and Ripley.

30 KRUM STATION, *Nov.* 25, 1895.

Via. Pro. No. —. E. B. No. 67.

To Gulf, Colorado & Santa Fe Railway Company, Dr., for freight and charges from Ft. Worth.

Consignor, T. & P., 456, Texarkana, Rankin, 11, 23,.

Billing.	Articles.	Weight.	Rate.	Freight.	Advanced charges.
Date of W. B.: 11, 23, 1895. No. of W. B.: 1502. Whose car: T. & P. No. 388.	Yellow pine.	34,400	10–10	34.40	48.16
					Total..... $82.56

Received payment for above company, 11, 26, 1895.
G. W. PACE.

Agents must be particular to fill out all blank spaces and to date this receipt.

Joint through lumber tariff reads as follows:

"File for public inspection.

The Texas & Pacific Railway Company, gen'l freight (El Paso route) department.

Texas, Sabine Valley and Northwestern railway; Paris, Marshall & Sabine Pass railway, in connection with Gulf, Colorado & Santa Fe Railway Co.

Joint Through Lumber Tariff.

T. & P. lumber No. 1726 H. cancels lumber No. 1685 H.
G., C. & S. F. No. 310 D. cancels No. 310 C.

Effective October 3, 1892.

Applying on lumber, lath, yellow-pine and cypress shingles, and States and heading.

In car-loads, minimum freight 24,000 pounds.

From mills on the Texas & Pacific railway; Texas, Sabine Valley & Northwestern railway; Paris, Marshall & Sabine Pass R'y to stations named on the Gulf, Colorado & Santa Fe R'y in Texas and Ind. Ter.

W. H. MASTERS,
G. F. A. G., C. & S. T. R'y, Galveston, Texas.
J. W. HARLE,
Gen'l M'g'r P., M. & S. F. R'y, Marshall, Texas.
C. O. SHEPHERD,
A. G. F. A. C. & S. R'y, Galveston, Texas.
R. J. EVANS,
G. M. S. V. & N. W. R'y, Longview, Texas.
J. M. STURE,
A. G. F. A. C. & F. R'y Co., Dallas, Texas.
G. H. TURNER,
A. G. F. A. T. & P. R'y Co., Dallas, Texas.
E. L. SARGUST,
G. F. A. T. & P. R'y Co., Dallas, Texas.

Dallas, Texas, Sept. 30th, 1892.
Authority No. 8735.

Lumber, etc., car-loads, minimum weight 24,000 pounds.

Rates in Cents per One Hundred Pounds.

To ——.

Column No. 1. From points named in Note A.	Column No. 2. From points named in Note B.	Column No. 3. From points named in Note C.
Gainesville 20	20	20
Fair Plains 20	20	20
Valley View..... 20	20	20
Sanger..... 20	20	20
Gerald 20	20	20
Krum..... 20	20	20
Justin..... 20	20	20

31 NOTE A.—From all stations on the Texas & Pacific railway in Texas, Jefferson to Clarksville, inclusive, via T. C. Junction and Texarkana, Texas.

NOTE B.—From all stations in Texas on the Texas & Pacific railway, Minneola to Bagleys and Waskoms, inclusive, via Marshall.

NOTE C.—From all stations in Louisiana on the Texas — Pacific railway, Greenwood to Harvey's canal, inclusive.

(Same objections by def't and ruling of the court as last above mentioned.)

Q. State whether or not this contract made by the Texarkana & Ft. Smith railroad, giving a rate of 2 cents from Rankin to Texarkana, was the inducement to establish your mill over there.

A. It was. I did not own any property in this county before I had the contract. It was the inducement for me to make the purchase.

Q. Was there any other line of shipment at the time this contract was entered into from Rankin out of the county?

A. No other way to ship out the lumber from Rankin except by the Texarkana & Ft. Smith railroad.

Q. How far from Rankin to the nearest line of railway outside of the Ft. Smith?

A. Texarkana—23 miles.

Q. What position do you hold with this company?

A. I am the agent at Rankin. It was to my interest, and, I suppose, to the interest of the company also, as I do the work for nothing, that I took the agency. In consideration that they would establish an agency or depot there I agreed to do the work for nothing.

Q. No other enterprise or mill at Rankin?

A. No, sir.

Q. What was the consideration for you to act as agent of this company at Rankin?

A. To facilitate the shipment of my mill products and bring in supplies. They never agreed to pay anything, and I did not
32 ask them to pay anything for my services as agent.

Q. Do you have anything to do as agent of the company or otherwise with making rates for the Texarkana & Ft. Smith railway, or any other railway?

A. No, sir.

Q. In whose charge or control is the making of rates on the Texarkana & Ft. Smith railroad?

A. Mr. Williams; I suppose he is the general manager at this time. W. L. Whitaker was general manager at the time this contract was made, and signed the contract.

Q. Where was Whitaker's office when this contract was signed?

A. I think that it was in the Henry building, in Texarkana.

Q. What is the amount of all of these overcharges?

A. The items in the original complaint amount to $1,304.15, and in the amended complaint, $185.94. These together is the amount

of my claim against the company for overcharges as shown by the tariff rates and expense bills.

Q. When did you clear up this site at Rankin for the establishment of a saw-mill?

A. My impression is that it was in the fall of 1891.

Q. What time in the fall?

A. Really, I could not tell you: some time about November, probably.

Q. Were you not clearing up there in July, 1891?

A. I cannot say.

Q. Were you not working there on it in August, 1891?

A. I could not tell you; my impression is that it was in the fall. I believe that there was some hewn timber got out there in the summer, but I do not remember the name of the man who got it out.

Q. When did you purchase your land there?

A. In the fall of 1891. I cannot tell you what time in the fall without my contract and deeds. I did not buy the land before this contract was made. I had options on some of it before I got this contract from Whitaker.

33 Q. When did you obtain your options on the land?

A. I could not tell you without looking at the papers.

Q. Was it in the summer?

A. I could not tell you. Some of the options were taken before I had this contract.

Q. You do not know whether you were preparing that land for the establishment of your mill there in July or not?

A. I cannot tell positively; it might have been in July.

Q. You were clearing it off, whenever it was, for the purpose of establishing your mill there?

A. Yes, sir.

Q. Where had you been operating your mill before?

A. In Cass county, Texas.

Q. Was not the timber exhausted there?

A. No, sir. I was going to move the mill, anyhow.

Q. When did you conclude to move the mill from the site in Cass county?

A. I do not remember; it was before I got this contract, and I was looking for the most available location.

Q. You are the only agent the road has at Rankin?

A. Yes, sir. I am also telegraph operator there, and have been express agent also, but ceased that quite a while ago.

Q. You have the use of the company's wires in your telegraph business and also your individual transportation?

A. I have.

Q. And in consideration of that and for the shipment of lumber there you act as the agent of the road at that station?

A. Yes, sir.

Q. You act as agent there for them in any other business they have besides your own?

A. Yes, sir.

Q. You sell tickets there?

A. Yes, sir.

34 Q. You stated that there was no other enterprise at Rankin except your own. What sort of a place is it?

A. Saw-mill town; nothing there but pile of sawdust and a little lumber and the mill, commissary, and houses. I own the commissary. There are 60 or 75 parties living there.

Q. You stated that at the time of the making of this contract it was contemplated that two of the directors of the road would go in with you in this mill business?

A. Yes, sir; that was the understanding at the time the contract was made.

Q. Who were these two directors?

A. Wm. Buchanan and Judge Estes. Judge Estes is my father-in-law. I believe they are directors of the company now.

Q. Did you not know that the road had nine directors?

A. I never made any agreement with any of them except this contract.

Q. At the time of the making of this contract you never had any arrangement with the board of directors or a meeting of them?

A. No, sir; this contract was made between me and W. L. Whitaker.

Q. Where was it made?

A. In Whitaker's private office, I think; it might have been in Mr. Buchanan's office; they were in the same building, Buchanan's office upstairs and Whitaker's downstairs.

Q. This arrangement between you and these two directors broke up about the time the Red River bridge washed away?

A. Yes, sir; the bridge went under about a year before this contract was made.

Q. When was that arrangement between you and these two directors abandoned?

A. About the time the bridge went through; we had it all figured out that when the road got over we would come over here and locate, and when it got over they gave me to understand that I should come over and buy the timber and they might

35 come in afterwards, and I got this contract, and they withdrew and I went ahead myself.

Q. Was not Whitaker to go into that enterprise?

A. No, sir; he could not if he had wanted to.

Q. There was to be just yourself and these two directors?

A. Yes, sir.

Q. How many directors of the road at that time?

A. I do not know.

Q. You say that contract was left in the hands of Buchanan?

A. I left it there; got it from Buchanan, who handed it to me. I think Buchanan got it from Whitaker.

Q. You never saw it until Buchanan delivered it to you?

A. Yes, sir; I saw it in the office. I did not see Whitaker execute it.

Q. Buchanan is largely interested in the saw-mill business; he is considered the largest millman in this section, is he not?

A. Yes, sir; I believe he is.

Q. Judge Estes was also interested in the lumber business?

A. Yes, sir; he was interested in the Gate City mill at that time.

Q. The running of this road north of the river into this county was regarded as opening up the best field for timber in this country, was it not?

A. I did not consider it so. I do not consider that this is a finely timbered county.

Q. You stated in your direct examination that this contract was entered into solely in your own interest. Do you mean to say that at the time of the execution of this contract it was not contemplated that these two directors should be associated with you in the mill business?

A. No, sir; we hung fire a long time, but it was thoroughly understood as an agreement between us, and it was in contemplation of the parties at the time this contract was made. I
36 stated that they abandoned it about the time that the bridge went down; they concluded that they did not want anything more to do with Whitaker.

Q. Still it was in contemplation between you three at the time the contract was made?

A. My understanding was that I should go on and buy the timber and they would come into it. Buchanan and Estes are the parties alluded to in the contract as associates or as forming the corporation.

Q. Did you ever consult any of the directors of the road about that contract?

A. No, sir.

Q. You say your mill outfit was brought to Rankin as soon as the road reached there. When was that?

A. I cannot tell you.

Q. Your ground and plant had all been arranged for the reception of the machinery?

A. Yes, sir.

Q. When were you ready to put in the machinery?

A. I don't know.

Q. You never signed that contract?

A. No, sir.

Q. The railroad company never got a copy of it signed by you?

A. No, sir; I never signed one.

Q. You do not know when you got your mill over there?

A. Not exactly.

Q. Were you contemplating moving elsewhere during the time you were delayed moving there?

A. Yes, sir.

Q. How many mills along the line of that railroad already in operation at the time this contract was made?

A. I don't know.

Q. Judge Bates' mill was there, was it not?

37 A. I think so. That mill was in this county, close to Red river, and was in operation at that time.

Q. The Hardwood lumber mill was in operation at that time?

A. I think so. I think the mill was there; I do not know whether it was running or not.

Q. What other mills along the line between you and Texarkana?

A. I do not know.

Q. Was not the Ashdown Lumber Company's mill already completed at that time?

A. I think they were putting up their mill.

Q. Do you know of any other mills that had a contract like yours?

A. No, sir.

Q. From your transactions don't you know that they did not?

A. No, sir; I known the tariffs put into effect by the defendant.

Q. Do you know the rates from these mills?

A. They were charged the same, I suppose.

Q. As agent of the company you received the company's lumber tariffs as they came out?

A. I did, sir.

Q. Didn't these tariffs show what was charged other people?

A. Yes, sir.

Q. Was anything ever charged to you over and above these tariff rates and as charged to other mills?

A. No, sir.

Q. Is not the complaint you are making that they charged you the regular tarifl rates instead of the special contract rates?

A. Yes, sir; I do not claim that they charged me more than the rest of the mills, at Ashdown, Bates,' and the Hardwood. The Ashdown mill was erected about the time mine was, and Bates' and the Hardwood Co.'s mill were there when I went down there.

Q. When did you begin acting as agent of the company at Rankin?

A. When the road first got there. I cannot approximate
38 when that was; ever since I have been there.

Q. How much lumber did you ship over the road, approximately, at the 2-cents rate which you claim?

A. I could not tell you. All I have a record of is what I call contract shipments.

Q. How long had you been shipping before you had a shipment to complain of?

A. Probably 10 or 12 months.

Q. When was the first tariff rate of the defendant published and when did it reach you?

A. The first circular I got was on November 14th, 1892. I have that circular with me. (Witness here produces circular.) This is the first tariff or circular issued on the Ft. Smith railroad that I know of. We are now and have been for the last four or five months billing freight on the Missouri schedule.

Q. You billed out all the lumber shipped from Rankin yourself?

A. Yes, sir.

Q. You made out the waybills for each one of the cars?

A. Yes, sir; myself or my clerk.

Q. Is not a waybill a long slip stating at the top of it the name of the company, the place of shipment and the place to which it is shipped, the date and number of the car and description of its contents. the weight, and rate per hundred and total amount, which goes along in charge of the conductor with the car?

A. Yes, sir; but, at the same time, we did not conform to that strictly, as sometimes, if routed by certain roads, we could only bill it to Texarkana. I kept copies of the waybills for all the cars involved in this suit. They are at Rankin now. I did not bring them over here.

Q. In billing these cars from Rankin to Texarkana you stated, on direct examination, that the Texarkana agent would bill them from Texarkana to destination?

A. That has always been my understanding.

39 Q. Has it been your understanding that the agent of the Texarkana & Ft. Smith railroad would turn the cars over to the other roads or bill them out himself?

A. For the last 3 or 4 months the agent of the Ft. Smith railroad bills them to all points on the Missouri Pacific railway.

Q. Referring to the sample expense bill and tariff sheet which you explained to the jury with the book, your estimates of the overcharges you claim againt the Texarkana & Ft. Smith railroad is arrived at entirely from the contents of these expense bills, of which this is a sample: "Car # 9820, Texarkana to Commerce, November 20th, 1895," in connection with the effective tariff rates from Texarkana?

A. Yes, sir.

Q. This expense bill says, "Charges —." How could you arrive at whether that overcharge was made by the Cotton Belt of the Ft. Smith railway?

A. I take it for granted that the St. Louis Southwestern R'y would not charge more than their established rate for the simple reason that a railroad company is not in the habit of charging more than their published tariffs.

Q. There is nothing on the face of these bills by which you could tell whether this overcharge is on the Ft. Smith or other roads?

A. Nothing on that bill, but there is on some of them here. This one, covering car # 1521, item No. 445, to Benton, Kansas, shows the amount charged by the Mo. Pacific and other charges of $14.04, which I take to be the amount charged by the Texarkana & Ft. Smith railway.

Q. You don't know whether they included in there any other charges than the Texarkana & Ft. Smith charges?

A. No, sir.

Q. Is it not in fact an ordinary thing for these overcharges to arise on every railroad?

A. I don't know. I have had many claims of that kind to adjust; all of us do.

40 Q. There is nothing in these bills to show the percentage charged by the Texarkana & Ft. Smith Company?

A. Nothing.

Q. This bill only shows "charges, $14.04," but you do not know whether that is the charge of the Texarkana & Ft. Smith road?

A. I just infer that that is its charge.

Q. You do not know whether these expense bills include any overcharges on the part of the connecting carriers or not?

A. From the way I understand it, it is all on the Texarkana & Ft. Smith road.

Q. Where did you get these expense bills?

A. They were returned to me by the consignee for the reason that we sell our lumber for so much delivered at destination, and when the car arrives at destination the consignees pay the freight and charges and return the bill to me for credit. All of these bills are payable on delivery of the lumber.

Q. You stated on direct examination that there was a large number of shipments made by you on which this 2-cent rate was not charged.

A. Yes, sir; these shipments were made when we had the Texarkana rates from Rankin to points on the other roads; in other words, we paid nothing for the haul from Rankin to Texarkana.

Q. What proportion of all your shipments were carried by the defendant to Texarkana without the charge of any arbitrary and through to destination from Rankin at the same rate charged by connecting lines from Texarkana to same point?

The plaintiff objected to above question because irrelevant and immaterial. Objection sustained. Defendant excepted.

Q. At the time you made the shipments alluded to on which no arbitrary was charged by this road to Texarkana they were shipped the same way for other shippers along the line?

A. I suppose so.

Q. What caused the change in the rate?

41 A. I suppose these rates varied on account of this road being unable to make the arrangements with the connecting lines. These rates are necessarily based on the arrangements with connecting lines.

Q. What was the date of your letter to Mr. Williams and Whitaker, calling attention to what you claimed about overcharges?

A. December 29th, 1892. Williams was general traffic manager at that time.

Q. What reply did you get to that letter?

A. I do not remember getting any.

Q. Did you get a reply orally?

A. I do not remember; Mr. Williams and I may have talked about it; I remember that he came into the office at one time and I showed him the contract.

Q. Didn't he tell you at that time that he could not recognize

that contract, and that your shipments would have to be at the same rates as others on the road?

Plaintiff objects to this question because irrelevant and immaterial. Objection overruled. Plaintiff excepted.

A. I don't think he did at that time, but afterwards he told me that he would not recognize it. At the time I showed Williams the contract, when he first took charge of the road, I do not think he said anything at all about recognizing it, but I think he wrote to me afterwards that he could not recognize it. I could not say whether it was in reply to my letter or not.

Q. When did Williams become general manager and traffic manager?

A. I do not remember.

Q. It was before any of these shipments were made complained of?

A. I don't know.

Q. Did he not become such officer before that mill was put up?

A. Yes, sir; I remember that distinctly now.

Q. You never called his attention to this contract at that time, did you?

42 A. I don't know. I remember the first time I called his attention to it was when I showed it to him in my office at Rankin, but don't know how long that was after I moved there.

Redirect examination:

Q. I understood you to say that no one was interested in that mill out there except yourself. Is that correct?

A. Yes, sir.

Q. Prior to the time this contract was executed you stated that Judge Estes and Buchanan contemplated going in with you.

A. Yes, sir.

Q. And at the time it was executed you say that you bought the timber, with still an understanding between them and yourself that if you agreed upon terms they would still go in?

A. Yes, sir; those are virtually the terms. We never agreed upon terms, and they were never interested in the contract.

Q. When did you purchase your lands for this mill?

A. I haven't the date of the purchase of these lands with me. I had some options on part of the purchase of these lands with me. I would pay so much for the land after the railroad went through.

Q. Do you remember when Judge Bates' mill was established?

A. No, sir; it was at Ogden.

Q. How far on the line of the road from Ogden to Rankin?

A. Ten miles, I think.

Q. The Hardwood lumber mill was in the Texas side; that was Judge Byrne's mill?

A. Yes, sir; I believe so. It was between Texarkana and the river, and about 18 miles from Rankin. Ogden and that mill were both between Texarkana and Rankin.

Q. Do you know what contract, if any, the owners and proprie-

tors of these mills or either of them had with the company about freight rates?

A. No, sir.

43 Q. Do you know whether they had any agreement whereby they were to be charged the same or less than you?

A. No, sir.

Q. Had you any information about what they were to be charged or had agreed to pay?

A. Nothing except the impression that they were to be charged the same rate that I was.

Q. This freight rate was got out to take effect Nov. 30th, 1892. How long had you been running and operating your mill at that time?

A. I do not remember exactly; I think I commenced operating the mill in the spring of 1892.

Q. Bef*roe* any freight rate at all was established?

A. Yes, sir.

Q. In regard to this excess of charges, state whether or not the books in the Texarkana office in the regular course of railroad business don't show the tariff charged by this road on every shipment of lumber from Rankin to Texarkana?

A. I don't know whether they do or not. I imagine they do.

Q. Your books at Rankin do not?

A. No, sir; on the first billing from Rankin we put no charges in the billing, but since the new company got hold of the road the charges have been in the billing.

Cross-examination:

Q. Mr. Jones suggested to you that before this tariff of Nov., 1892, there had been no freight rate at all established. You do not mean that, do you?

A. That is the first tariff I ever saw on the road.

Q. Up to that time they were charging the rate mentioned in the contract?

A. I could not tell you.

Q. Did they charge you anything?

A. I could not tell you.

44 Q. They had established a rate from Rankin before that, hadn't they?

A. Yes, sir; I suppose they had. It was this way: anything the Texarkana & Ft. Smith railroad got 4 cents out of they did not charge me anything and I got the same rate as if from Texarkana. Sometimes they would go through on one rate and sometime on another. The Texarkana & Ft. Smith railroad was not in business then like other roads—was not in shape to do it.

Q. Irrespective of that tariff you did not know whether they had any rate established or not, did you?

A. No, sir; up to that time there were no overcharges on my shipments.

Q. When did the new company you speak of take charge of the road?

A. I could not tell you.

Q. This was the first public tariff that you received up there. How did you bill out goods before that?

A. I do not think there were any charges specified in the billing at all—just billed it on a car—tacked on the lumber. We had a tariff on merchandise and such things. I had the tariff in the office. Had no tariffs on lumber before I went there.

Q. You don't know what tariff they had from Ogden and the other mills?

A. No, sir.

Q. Your mill was the farthest north of all of them?

A. Yes, sir.

45 W. A. WILLIAMS, for plaintiff, testified:

Q. Don't your books at Texarkan show all moneys collected on account of the lumber shipped from Rankin over your road to Texarkana and beyond?

A. Yes, sir; they do.

Q. For instance, take a car of lumber from Rankin to Sherman; don't your books show how much of the freight money was paid to you and how much to the T. & P. R'y?

A. No, sir; they only show how much was paid to our road.

Q. Then you can take your books and find out how much was paid to your road on each one of these cars?

A. Yes, sir; if they were shipped over our road.

Q. Were you president of the road when Whitaker executed that contract?

A. I was not. I never had any conversation with him about it until lately.

Q. Is this his signature? (Presents contract between pl'ff & def't for fr't rates.)

A. It looks very much like it.

46 Thereupon the defendant, in order to sustain its defense, introduced the following testimony:

L. A. BYRNE, for defendant, testified:

Q. Were you interested in the mill business along the line of the Texarkana & Ft. Smith railway in 1891 and prior to that time?

A. Yes, sir; some lumber and mill property fell into my hands as security, and I had to work it out as best I could.

Q. Where was that mill located?

A. At the foot of the hills, this side of Texarkana, about 5 miles; the boiler was in Arkansas, and the engine in Texarkana, and the engine in Texas. The station is called Corbin, on the Texarkana & Ft. Smith railroad.

Q. When was that mill put into operation?

A. I could not tell you; can only tell you when I went into possession, at which time it was a running mill; it occurs to me that it was in March, 1891. They had the saw-mill and some lumber and a good many logs piled round the mill when I took charge of it.

Q. How long did you run it?

A. It didn't run all the time, but the shipment of lumber was continuous until about March, 1892, when the mill was moved to Wilton, and the Wilton Lumber Company was incorporated, but the incorporation was not formed until April 12, 1892.

Q. Has it been in operation there since?

A. Yes, sir; up to about, I suppose, a year ago, maybe a little more, when the planer was burned down.

Q. What other mills on the line in operation in September, 1891, that you know of?

A. The road in September, 1891, extended perhaps no farther than the Red river, but there were some mills in operation along the line of the road; Judge Bates had a mill at Ogden, and there was another mill in operation at Wilton called the — mill;
47 it was Evans' mill. This mill was within 100 or 150 yards of the road.

Q. How many mills in operation along the line in 1893?

A. Bates' mill first, and then Kizer's, and then the Wilton Lumber Company, and then the —— mill (Kinsworthy had bought it), and then there was the Ashdown Lumber Company and another little mill off about a half a mile from Ashdown.

Q. While your mill was at Corbin state rates you paid for the shipment of lumber to Texarkana. Did you pay the established rates or did you have a special contract for rates?

Objection to this testimony by plaintiff. Objection overruled. Plaintiff excepted.

A. I don't remember what the interstate rate was, but the rate to Texarkana proper, where the most of the material was shipped (to the furniture company there), was $10.00 per car. That is my recollection as to the average rate at that time. The road had no scales and gave us that rate.

Cross-examined:

Q. You don't know when that mill was established at Corbin that you speak of?

A. It was established when I took charge of it in March, 1891.

Q. As a matter of fact, there were no published tariff rates from Corbin to Texarkana at that time?

A. I could not tell you about that. It occurs to me that they were engaged in constructing the road to the river and across it, and my recollection is that they established the rates at $10.00 per car.

Q. There was no other mill on the road at that time?

A. That is on the constructed line. There were other mills on the line which was graded. I think the road crossed the river in the fall of 1891. The Wilton Lumber Company was formed in April, 1892, and I know the road was running there at that time. I know that on the 15th day of November, 1891, the track was
48 laid within 2½ miles of Ashdown.

Q. Do you know where the road was completed in September, 1891?

A. About the bridge, I think.

49 W. A. WILLIAMS, for defendant, testified:

I reside at Texarkana, Texas; am general manager of the Texarkana and Ft. Smith railway. I was general manager from the 1st of December, 1891, until the 1st of February, 1892, when this road was absorbed by the new company, and from that time until 1894 I was general superintendent of the road, and then I was made general manager again and have been in that position until now.

Q. As general manager of the road do you have charge and control of its traffic department and rates?

A. Yes, sir.

Q. Explain to the jury how the variation in the arbitrary charged by the Texarkana & Ft. Smith railroad, mentioned by Mr. Kizer, occurs.

A. When I took charge of the road the through rates from — point on the road, say Rankin, to points on roads leading out of Texarkana were made by the arbitrary carried by us or by the amount allowed by the connecting lines, and at that time they were allowing us 2 cents out of the Texarkana rate. In other words, they allowed us from 2 to 4 cents cut out of the regular rates collected by them. Part of the rates from Rankin were Texarkana rates at that time. About a year after I took charge the lines leading out of Texarkana refused to give us anything, took out all pro rates in November, 1892, when that circular was issued, and, of course, we could not haul the lumber for nothing. The tariff sheet fixed the rate at 3 cents a hundred and applied to all mills along the line of the road.

Q. When was the first you learned of Mr. Kizer's claim under this contract?

A. About the time this circular letter was issued. I think I received a letter from him similar to the one he shows here complaining of the rate. I replied that we would not recognize the contract; that it was contrary to the interstate commerce law, and that he would be protected in the same rates that others enjoyed and under the same conditions.

50 Q. You say that in issuing these tariffs, wherever you could get a pro rate from the other lines, you gave the shippers on your road the benefit of it?

A. Yes, sir; as when we got 4 cents from the other roads we made no charges on our line. Our tariffs have been adjusted all the way through to conform to that condition.

Q. Who is the agent of the company at Rankin?

A. Kizer has been our agent there ever since the station was opened, and as such he has been furnished with all the tariffs furnished during that time.

Q. State whether or not on all these shipments Kizer made over this road he has been charged more or less than other mills on the line and the regular established tariff rates.

A. He has not, unless it was an error in calculation. These tariffs were effective all over the line and on everybody on the line.

I have never heard of any one else having such a contract with the road.

Q. How long have you been in the railroad business?

A. I have been railroading since 1876; have been in every department of a railroad, mostly in the traffic departments and transportation departments, and am familiar with the costs of hauling freight on a railroad.

Q. What is the least amount that a railroad company under conditions existing in this country could haul lumber from these points, particularly Rankin to Texarkana, without loss?

Plaintiff objected to this testimony. Objection overruled by the court. Plaintiff excepted.

A. 4 cents a hundred.

Q. You have already stated that Mr. Kizer was in no instance charged more than the established rates from Rankin and than was paid by others on the line; were these rates reasonable?

A. Yes, sir; they were very lo-, lower than any similar haul out of Texarkana.

51 Q. Explain to the jury why the rates on lumber were the same for all the mills on the line and if they were and are reasonable.

A. Our road not being a through line, we had to adopt an arbitrary over and above the Texarkana rate, and this was fixed at the same for all the mills on the road. This rate was very reasonable, lower than the company could haul the lumber for and pay operating expenses and interest on the investment. The rate was 4 cents per hundred from any mill on the road, and whatever we got out of the other roads we deducted from our charges. Lumber could not be hauled over the road for less than 4 cents a hundred.

Q. Are you familiar with the prevailing tariff rates on the other roads going into Texarkana?

A. Yes, sir; and the lowest rate on any road out of Texarkana is 5 cents a hundred for 5 miles and under.

Plaintiff here objects to all the testimony introduced going to establish the fact that the rate charged of 4 cents a hundred is a reasonable rate, and that it is a losing rate considering interest on investment; which objection was by the court overruled. Plaintiff excepted.

Q. In September, 1891, and at the time Mr. Kizer's mill was put up what other mills along the line of road?

A. One between 5 and 6 miles from Texarkana, the Hardwood mill, and a mill at Ogden, run by Judge Bates; mill at Ashdown under construction, and also one at Wilton.

Q. State whether or not all of these mills have been charged uniformly the same rates as Mr. Kizer.

A. Yes, sir; they have and still are.

Q. There were no other shipments of lumber from Rankin except from Kizer?

A. No, sir.

Q. Rankin is south of Ashdown?

A. North.

52 Q. When did this tariff go into effect? (Witness here handed rate circular.)

A. November 30th, 1892.

Circular here read to the jury as follows:

Texarkana & Ft. Smith R'y Co.

TEXARKANA, TEXAS, *November* 14, 1892.

To whom it may concern:

This is to give notice to all parties interested that this Co. will issue a tariff effective on the 30th of November, 1892—

Making rates to all points outside the State of Texas on yellow-pine lumber, laths, and shingles based on an arbitrary of 3 cents per hundred pounds higher than Texarkana rate; also an arbitrary of one cent per hundred pounds on shipments destined to points in the south of Texas on the same commodities, located on the following lines, viz: Texas & Pacific R'y Co., St. Louis Southwestern R'y, Texas Central railway, Ft. Worth & Rio Grande R'y, Ft. Worth & Denne City R'y, Wichita Valley railway, International & Great Northern R. R., Gulf, Colorado & Sante Fe R'y.

W. A. WILLIAMS,
General Manager.

Q. That same tariff was effective at all stations along the line?

A. Yes, sir; all the rates made by us were based on what we got out of the connecting lines at Texarkana; they got mad at us for about a year and refused to give us anything, and during that time we charged 3 cents a hundred. It is customary among the railroads to give pro rate.

Q. Explain what you call an arbitrary.

A. Arbitrary is the rate we charged from stations along our line in addition to the rate from Texarkana on through shipments. This arbitrary mentioned in this circular is 3 cents higher rate than was charged by the roads out of Texarkana. In the State of Texas we charged 1 cent more.

53 Q. How were your tariffs issued before this circular?

A. The connecting lines issuing their tariffs would put our name in them—like this tariff here—in which the rate from stations on our lines are inserted. The other lines embodied our stations in their tariffs, which saved us the printing of tariffs, as the road was just under construction.

Q. Who is the secretary of the defendant company?

A. I am; have been since February, 1895.

Q. Are you the custodian of its records and books?

A. Yes, sir.

Q. How many directors has the company had all the time?

A. Nine.

Q. Have you examined the record of the proceedings of the directors' meeting's?

A. Yes, sir.

Q. State whether there are any resolutions of the directors authorizing any such contract as this with Kizer.

A. No, sir; no such resolution or anything in the proceedings in regard to the matter, and there was no notice to the new company when it bought the road that there was such a contract in existence. This book I have in my hands is the one containing the records of the meetings of the directors and stockholders.

Cross-examined:

Q. What is that book?

A. The minutes of the Texarkana & Northern Railway Company and the Texarkana & Ft. Smith Railway Company up to the time this company now operating it took charge of it.

Q. What is the date of the last meeting of the directors?

A. November 19th, 1889. This new company took charge in December, 1892.

Q. No meeting from 1889 to 1892 shown in here?

A. No, sir.

54 Q. Who was the secretary at that time?

A. J. H. Smelser was secretary of the Texarkana & Ft. Smith railway and Jos. Marx was secretary of the Texarkana & Northern; they were the same road.

Q. You were not secretary at that time. How do you know that is the record of the meetings?

A. The board of directors turned this book over to the new company and told us that it was the only book they had.

Q. Do you know whether they held any meetings of the board of directors from the time of this last meeting until the new company bought the road?

A. I do not.

Q. Returning to the tariff sheets, state whether or not there was anything issued during 1892 and 1893 to show what rates would be made by the Texarkana & Ft. Smith road.

A. Yes, sir; all the time from 1890 to the first of 1891, before I went over to the road, tariffs had commenced to be got out.

Q. That is, would your tariff sheets show regular rates to be charged?

A. Yes, sir.

Q. Did they show contracts you had with individuals about rates to be charged them?

A. No, sir.

Q. When did you become connected with this road?

A. December 1st, 1891, my connection with the road was formed, and I assumed the position of general manager of the road.

Q. Who was general manager before you?

A. They didn't have any; they had a general superintendent, a man by the name of J. Y. Burke. W. L. Whitaker was president.

Q. What position did you next hold?

A. I was general superintendent from 1893 to 1895. I was appointed superintendent in February, 1893, and general
55 manager in February, 1895, at the annual meeting of the directors.

Q. You say that your road charged 4 cents a hundred on all shipments of lumber over your road, and that whatever pro rate you got from connecting lines out of Texarkana you deducted from your charges and gave the shipper the benefit of it?

A. Yes, sir.

Q. Suppose you are shipping a car to Kansas City, Mo., from Rankin. If the car is billed at Texarkana rates from Texarkana to Ft. Smith, what benefit would the shipper get?

A. If we got 4 cents from the connecting line, we charged from Rankin the same as Texarkana rate.

Q. Who paid you the 4 cents in that instance?

A. The connecting line.

Q. Then you charge a man Texarkana rates because the connecting lines had paid you for hauling it to Texarkana?

A. Yes, sir.

Q. Supposing they allowed you two cents, then you allowed the shipper the benefit of that much?

A. Yes, sir.

Q. Then you are getting 4 cents a hundred from the shipper or the connecting lines?

A. Yes, sir.

Q. There was a time when the connecting lines did not allow your road anything out of the Texarkana rate?

A. Yes, sir; that was the time we made the rate of 3 cents, which was in force about a year, and after the roads allowed the pro rate again we changed the rate back as it was before.

Q. You say you received that letter from Kizer notifying you about the contract?

A. Yes, sir; one similar to it.

Q. Who made and makes the rates on your road?

A. I make the rates now; made them while I was general manager.

56 Q. Who is the president of the road now, and where does he live?

A. W. S. Taylor.

Q. Do you know that W. L. Whitaker was general manager of that road up to the time you were appointed manager?

A. No, sir; I do not.

Q. Don't you know that he was sole owner almost?

A. No, sir; I do not know how much stock he held. He employed me the 1st of December, 1891, and appointed me general manager, and I looked to him for my employment and instructions. He was the superior officer of the road up to the time of selling it out to the new company. He was president of the road at the time I was appointed general manager. As president of R. R. before my appointment as general manager he made fr't rates.

Q. Who has charge of the rate-making?

A. At the time of the reorganization, which occurred in 1892, I became general superintendent, and from that time I have had charge of all the traffic arrangements except during a year, 1893-1894, when Mr. Hubbell had it.

Q. You say that, while 4 cents is a reasonable rate, you gave these people a three-cents rate, when 4 cents was as low as you could haul it?

A. Well, we divided the loss with them; they had been getting the Texarkana rate before that.

Q. You state that 4 cents is a low and reasonable rate considering the interest on the investment?

A. I stated that it never paid the company interest on the investment.

Q. Didn't you state to the jury that the 4-cents rate per hundred would not pay the interest on the investment?

A. No, sir.

Q. What amount is the road bonded for?

57 A. $25,000 per mile for building it; the bonds bear interest at the rate of 6 per cent. I do not know what the bonds were sold for.

Q. When you go to establish a reasonable rate, you consider the interest on the bonded indebtedness?

A. Yes, sir; we consider a good many things also—the volume of business, cost of handling it, and all these things.

58 L. A. BYRNE, recalled for defendant, testified:

Q. Do you know when Kizer put in his mill at Rankin?

A. I could not give the exact date; he began putting in the machinery about the time the railroad got there. The railroad got to Ashdown about Christmas in 1891.

Q. Do you know when he cleared off the place for the mill?

A. He was quite a while at that; he cleared off part of it very early, before the road crossed the river; he cut the undergrowth and piled it up. In the summer of 1890, during the summer term of the court (my recollection is that it was held in July, as now), I was attempting to locate the towns on the road, and Mr. Mills, who was then sheriff, got on his horse and went with me to his place on the south side of Kizer's mill to look at it for a town, and he pointed out the place cleared off for Kizer's mill, and I saw the smoke of the burning brush. That must have been in July, 1890, because in November, 1890, I established Ashdown.

Q. What had been done there at that time?

A. The underbrush was cut at that time. I saw a man at work there that day, but did not know who he was. This was the same place that Kizer has his mill located at now. I passed there very often, trying to establish a town there. I established Wilton also after I selected Ashdown.

Q. You have also stated that you have been a continuous shipper on this line. Have you ever had any but the established rate?

A. I was interested and knew the rates for shipments. It was as Mr. Williams stated. The rate varied often, sometimes higher and lower, and sometimes it would not be anything. I heard of the changes from the mill, and especially when the rate was withdrawn by the other roads, and I went to see Mr. Williams about the matter, and he explained it to me. The mills I was interested in were charged and paid the regular established rates.

59 Q. Did the road have regular tariffs?

A. Yes, sir; sometimes they had separate tariff sheets, and sometimes their rates were included in the tariff sheets of the other roads.

Q. You were director in the Texarkana & Ft. Smith railroad once, were you not?

A. Yes, sir; it was when I had paid a security debt for Whitaker that I resigned, perhaps in 1893 or 1894. I was a director in 1891; it might have been as late as 1894 when I went out. I was first selected in 1889 and continued until about the first of 1894; was director when this contract was made.

Q. Did you know anything about this contract?

A. No, sir; I was not consulted about it and knew nothing of its execution.

Q. Were you ever advised of it or have any notice of it?

A. I was never advised of it in the capacity of a director; Mr. Kizer told me about it a year or two after it was executed.

Cross-examination:

Q. When did you become a director in this company?

A. I was elected director on August 27th, 1889, and continued until about 1894, maybe 1893.

Q. Is it not a fact that you were never a director after this new company bought the road in 1892?

A. I never was notified of any cessation of my power as director.

Q. Does your name appear as a director in the record of the meetings in this book?

A. Yes, sir; I am down here in the proceedings of two meetings, and the minutes of some of the meetings don't name the directors.

Q. They didn't consult you about this contract?

A. No, sir.

Q. Is it not a fact that Whitaker did everything without consulting anybody?

60 A. He managed the road.

Q. Is it not a fact that he was almost exclusively the owner of the stock?

A. I don't know; I owned two shares.

Q. What was the capital stock of the company?

A. When I went into it the capital was $1,000,000, and it was afterwards raised to $4,000,000. I could not tell how much Whitaker owned.

61 N. W. RATES, for defendant, testified:

Q. Where do you reside?

A. At Ogden, in Little River county, Arkansas; have resided there since 1879.

Q. When did this Texarkana & Ft. Smith railroad cross Red river?

A. I do not remember the exact time. I believe it was in the fall of 1890. Ogden is two miles north of the river, in Little River county.

Q. Through what State and county does the road run from the river to Texarkana?

A. Through Bowie county, in the State of Texas.

Q. In what State is Rankin?

A. Rankin is in Little River county, Arkansas.

Q. When did you first commence to ship lumber on this road?

A. I commenced to ship lumber as soon as the road reached my mill, and continued to make such shipments until I quit the business.

Q. Did you have any special contract with reference to rates or did you pay the regular tariff rates?

A. I paid the regular tariff rates; never had any special contract.

Q. Did the rates vary?

A. The first shipments I made we got the Texarkana rates, and I think this continued for 8 or 10 months. I don't exactly remember. Whitaker told me he thought probably he could keep up that rate all the time. He explained it this way: that the roads at Texarkana were bidding for the business off his road, and that they would pay the differential or arbitrary, whatever it is. He didn't say what it was, but that the other roads paid a pro rate, and that as soon as they did his road would give us the benefit of the Texarkana rate. Part of the time our shipments cost us nothing to Texarkana, and at other times it was all the way from 1 to 4 cents a hundred on shipments beyon- Texarkana. When the rates

62 were changed I paid the regular tariff rates made by the company.

Q. How far is it from Texarkana to Ogden?

A. 12 miles.

Q. How far to the next station north?

A. 2 miles to what is called Shoals; it is not a station, just a saw-mill there. The next station north of that is Ashdown; there was a little station at Hudson's creek, where there was a little saw-mill.

Q. What is the distance from Ogden to Ashdown?

A. It is called 8 miles.

Q. What is the next station north of Ashdown?

A. The next station is called Rankin, some 4 or 5 miles, and the next station is Wilton. They are all in Little River county, and are saw-mill points.

Q. What is the character of the country traversed by this road north of the river?

A. It is a pine-timbered country, and this road extends to all the stations named in the order mentioned.

Cross-examined:

Q. Do you know when the road reached Ogden in the course of construction?

A. I do not.

Q. You are not sure that it crossed the river in 1890?

A. I am not.

Q. You say Whitaker fixed your rates?

A. Yes, sir; he was the president of the road and the man with whom I made all arrangements with reference to freight rates.

Q. What was the rate?

A. I paid an arbitrary of from 1 to 4 cents from Ogden to Texarkana. I had no special contract with them.

Q. Do you remember that one time the road charged an arbitrary on all shipments of lumber north of Hudson, and
63 didn't charge any from stations south of Hudson?

A. I don't know. I heard something about that.

Q. Did Whitaker, the president of the road, tell you that such arrangements were made; that all stations south of Hudson paid the Texarkana rate and those north of Hudson paid an arbitrary?

A. I do not remember hearing him say so. I cannot say whether I heard such a thing from an officer or agent of the road.

Redirect examination:

Q. Hudson is between Shoals and Ashdown?

A. Yes, sir; it is south of Rankin and north of Ogden.

64 W. A. WILLIAMS, recalled for defendant, testified:

Q. When did you become the general manager of this road?

A. On 1st day of December, 1891.

Q. After that time you were general manager as well as traffic manager?

A. Yes, sir.

Q. State whether or not there was any arrangement or rate by which an arbitrary was charged on shipments north of Hudson and none from stations south of there.

A. There was not. The regular established rates were put out from time to time and furnished to Mr. Kizer as agent of the company.

Q. What consideration was given to Mr. Kizer as agent at Rankin?

A. Transportation for himself and family or connections, the use of the telegraph wires of the road.

Q. His residence at that time was at Texarkana, Texas?

A. Yes, sir.

Q. You have been the custodian of all the records of the company up to the time that it was reorganized and the property changed hands. Did the defendant have any by-laws?

A. No, sir; I never saw them; there are none in the records.

Q. When was the company reorganized and passed out of Whitaker's control?

A. The 1st of December, 1892, he ceased to be president of it, but was still continued with the road as a director for about one year afterwards, and after that time he has had nothing to do with it.

Q. Prior to your connections with this company as general manager December, 1891, what was your occupation in Texarkana?

A. General agent for the Texas & Pacific and Mo. Pac. R'ys at Texarkana.

Q. Are you familiar with their course of dealing and rate-making in connection with this road as a connecting line?

65 A. Yes, sir.

Q. State whether or not the method used in establishing the arbitraries and rates were the usual and customary ones on this road.

A. Yes, sir; that was the regular policy all the time.

Q. What was the average weight of a car of lumber shipped by the Hardwood Lumber Company?

A. I suppose the cars would average about 30,000 pounds.

Q. No more than that?

A. I would not think so.

Q. What is the distance from Texarkana *of* Corbin and these other stations?

A. Corbin was between 5 and 6 miles; Ogdon, 13 miles; Ashdown, 20; Rankin, 23, and the road run on up to these mills, as stated by Judge Bates.

Q. Was it customary or was it unusual that the arbitrary should be based on the same rate from all the stations instead of mileage?

A. It is on through business; on local business it is different; on through business the haul from the same territory is placed on the same rate.

Q. Circumstances and conditions of shipments from each one of these mills along the line of the road were substantially the same?

A. Yes, sir; the lumber traffic was the principal business of the road at that time.

Q. How many lumber stations south of Rankin during the time of these shipments?

A. About 6 mills altogether, closer to Texarkana than Rankin; there were also mills north of Rankin, and all of them were charged the same rate.

Cross-examination:

Q. How many mills on the line of that road at the time this contract was made?

66 A. I think 3 or 4. There was a mill at Corbin, one at Ogden, one at Wilton, and one close to Ashdown.

Q. Do you mean to say that there was a mill at Wilton in September, 1891?

A. Yes, sir.

Q. Whose mill?

A. I don't remember the name of it. There was also a mill at Ashdown.

Q. How far was the road constructed in September, 1891?

A. In September, 1891, the road was completed to about Ogden or Hudson's Creek; it crossed the river early in the summer of 1891, and the bridge was completed so that trains were running over it. The road reached Ashdown about Christmas in 1891.

Q. You stated that Kizer had a free pass over that road and the use of the telegraph wires for his business; you had no operator or agent at Rankin other than him?

A. No, sir.

Q. Paid him no salary?

A. No, sir.

Q. He was engaged in shipping lumber over the road in large quantities, wasn't he?

A. Not so very much; other mills shipped more.

Q. Was it unusual for you to give a free pass to men shipping lumber over your road?

A. I don't know they did so.

Q. Judge Bates had a pass, didn't he?

A. A pass was issued for him on account of bondsman for the Co.

Q. Judge Byrne had a pass, didn't he?

A. He had a pass as land agent. He has a pass now.

Q. What is the consideration of that pass?

A. I decline to answer.

Q. Any other shippers along this road holding passes?

67 A. I decline to answer.

Q. It is not unusual to issue passes to large shippers?

A. It is.

Q. At the time this contract was made a great many passes were issued?

A. I think so.

Q. How many passes to mill men along the road now?

A. I decline to answer on the ground that it is not connected with this business. I have answered that none of the mill men have passes on account of being a shipper or mill men.

Q. You say that the average weight of a car of lumber shipped by Judge Byrne was about 30,000 pounds?

A. Yes, sir; I suppose the average from Kizer was about the same.

Q. You say 4 cents a hundred would be a reasonable rate?

A. Yes, sir; the car is based on a minimum rate of 24,000 pounds.

Q. At 4 cents per hundred the freight would be $12, on an average?

A. Yes, sir.

By the COURT:

Q. You say that you are authorized to make rates?

A. Yes, sir.

Q. Where do you get that authority?

A. From the board of directors. My office is elective. On most

roads the office of traffic manager is appointive by the general manager.

Q. Any action on the part of the corporation necessary to vest that power in you?

A. I am elected by the board of directors—that is, since the organization of the company. When I was first appointed general manager, in 1891, I was appointed by Whitaker. This matter is regulated by the by-laws now, and has been since the reorganization in 1892.

By ATTORNEY FOR DEFENDANT:

Q. You say that Kizer was furnished transportation for
68 himself and his family, and his home was in Texarkana during all that time?

A. Yes, sir; that arrangement was between him and the company and was satisfactory to both parties, and he is now acting as agent under that arrangement.

Cross-examination:

Q. Is it not a fact that when the present management bought out Whitaker's interest in the road that they reserved a large block of his interest to indemnify them for contracts he had made on behalf of that company?

A. I don't know anything about that. I never got such information from the railroad company. I heard it from you yesterday for the first time.

Q. Don't you know that the company didn't settle with Whitaker until after they had paid off all the liabilities he had incurred?

A. I heard that; yes, sir; but did not know that they held back his interest until these matters were settled.

Q. Were you not advised of this contract before they ever made the final settlement with Whitaker and of the claim under this contract?

A. Yes, sir.

Redirect examination:

Q. What do you mean by before the road made final settlement with Whitaker? *It* is not a fact that Whitaker sold his interest, which was heavily mortgaged, to the Missouri, Kansas — Texas Trust Co., and that the transaction was settled and closed out in September, 1891?

A. Yes, sir.

Q. At that time nothing was known about this contract with Kizer?

A. No, sir.

Q. You don't know whether the trust company has ever finally settled with Whitaker, do you?

A. No, sir.

69 Cross-examination:

Q. When did you say they bought Whitaker out and made final settlement with him?

A. They bought him out in December, 1892. I don't know when they made the final settlement with him.

Q. From your management of the business, don't you know that you have paid claims made by Whitaker since December, 1892, and as late as 1893, and that they were protected by the interest of Whitaker, which was held up?

A. I don't know. I know that we have paid such claims, and that they have been charged up to Whitaker.

It is here admitted by the plaintiff that the contract sued on was written by Judge Estes.

70 The plaintiff thereupon introduced the following testimony in rebuttal:

A. J. KIZER, for plaintiff, testified:

Q. State what the terms were upon which the office was established at Rankin, and upon which you consented to act as agent and operator for the company.

A. My understanding was that I wanted a station in there, and I agreed to do the work for the accommodation of the station, and, voluntarily on the part of the officials, they gave me a pass. They never stated to me that this pass was in consideration of my acting as agent for the company that I remember. Nothing was said about it.

Cross-examination:

Q. You accepted the agency under these conditions?

A. Yes, sir; and I was glad to do it.

Q. As a matter of fact, your family was furnished with transportation whenever asked?

A. I don't remember.

This was all the testimony introduced in the case both by plaintiff and defendant.

And thereupon, by consent of both plaintiff and defendant, the jury herein was by the court discharged, and it was agreed by the paties hereto that all the issues herein should be and they were submitted to the court, sitting as a jury, upon the testimony herein set forth.

71 And thereupon the plaintiff asked the court to declare the law in this case as follows:

If the proof in the case shows that the plaintiff and defendant on the 16th day of September, 1891, entered into a contract in writing, whereby plaintiff agreed to construct and maintain a saw-mill in Little River county, Arkansas, on the line of defendant's road, for the manufacture of pine, oak, and other kinds of lumber, and defendant agreed to furnish cars and ship all lumber manufactured by said mill for plaintiff over all routes over which lumber is

usually shipped from Texarkana, Texas and Arkansas, at a rate not to exceed two cents per hundred pounds over the rates charged by different railway companies from Texarkana, and that plaintiff has in all things complied with and performed his part of the contract, and that defendant has failed to perform its part of said contract and refused to ship lumber for plaintiff at the contract price, but has charged plaintiff a greater rate of freight for shipping his lumber than the rate provided by the contract, and plaintiff was compelled to pay such higher rate in order to get his lumber shipped; that at the time said contract was made defendant's road was not completed to Rankin, where said mill was located, and was not completed to that point until Dec. 25th, 1891; that plaintiff established and began to operate his mill and ship his lumber soon after the road reached Rankin; that defendant had no tariff rate on freight in Arkansas until Nov. 15th, 1892, and plaintiff did not know what defendant was charging other persons for shipping freight over its road at the time said contract was made and not until Nov. 15th, 1892, when defendant established and had printed its first tariff sheet, and that the rate provided in said contract is a reasonable and just one—

That the court declares the law to be that the contract is valid and binding and not prohibited by the law, and that plaintiff is entitled to recover any excess of freight which he has been
72 required to pay by defendant for shipping his lumber from Rankin to Texarkana over and above the rate provided for in the contract if any such excess be shown by a preponderance of the evidence.

Which request is by the court refused; to which refusal of the court in declining to declare the law as requested the plaintiff at the time excepted.

And after argument of counsel and the court being sufficiently advised, the court doth make and file its findings of fact and conclusions of law in words and figures as follows, to wit:

Little River Circuit Court.

A. J. KIZER, Plaintiff,
vs.
THE TEXARKANA & FT. SMITH RAILWAY COMPANY, Defendant. } No. 419. Law.

Findings of Fact and Declarations of Law.

The court finds that on the 10th day of September, 1891, the plaintiff and defendant entered into a contract in writing, whereby plaintiff agreed to construct and maintain a saw-mill in Little River county, Arkansas, on the line of defendant's road at a point already selected by plaintiff, for the manufacture of pine, oak, and other kinds of lumber, and the defendants agreed on its part to furnish cars and ship all lumber manufactured by said mill for plaintiff over all roads over which lumber is usually shipped from Texar-

kana, Texas and Arkansas, at a rate not to exceed 2 cents per hundred pounds over the rates charged by the different railroad companies from Texarkana, and that plaintiff has in all things complied with his part of said contract, but that defendant, from and after the 30th day of November, 1892, has refused to ship such lumber for plaintiff at the contract price, but has charged plaintiff a greater rate for shipping said lumber than the rate provided for by
73 the contract, and that plaintiff was compelled to pay such higher rate in order to get his lumber shipped.

That the contract was executed on the part of the defendant by W. L. Whitaker, who was then the president and general manager of the defendant company, and as such had authority to make freight rates and to execute a contract fixing the rate for shipment of freight; that at the time the contract was entered into the defendant's road was not completed to Rankin, the point where plaintiff's mill was located, and that no freight rates had been established in Arkansas for the shipment of freight for that point; that def't did establish the following rates Nov. 15th, 1892, to take effect Nov. 30th, 1892: Not to exceed three cents per 100 lbs. from any point on defendant's road to Texarkana.

When said instrument was signed by Whitaker it was contemplated that the plaintiff and Wm. Buchanan and B. T. Estes should be associated with him in the establishment of the saw-mill mentioned in said instrument. Buchanan and Estes were directors of the defendant company and Whitaker was its president and general manager at that time. The contract was written by Estes, who is the plaintiff's father-in-law. The defendant company then had its regularly constituted board of nine directors. There was no action of board of directors authorizing or ratifying the execution of said contract made by Whitaker shown by the minutes of the company. In September, 1891, the defendant's railroad extended from Texarkana northward through Bowie county, in the State of Texas, and across Red river, past Ogden, in Little River county, Arkansas, a distance of about 15 miles, and at the time of the execution of said contract by Whitaker saw-mills were located on the line of said railroad at Corbin, Texas, at Ogden, Arkansas, and other points. Plaintiff had selected and established the site for his saw-mill at Rankin, about 25 miles north of Texarkana, in 1890, before the contract sued upon was executed. The defendant's road was in process of con-
74 struction northward, and was completed to said Rankin in December, 1891. As soon as the road reached Rankin the plaintiff put in his saw-mill there, and by agreement between himself and defendant became and has ever since been and still is the defendant's regular local agent at said town of Rankin, and as such agent had and has control of defendant's local freight and passenger business at that point. When the contract sued on was signed by Whitaker the defendant's regular tariff rate for transportation of lumber from Corbin to Texarkana, charged and collected from the mill-owners at Corbin, was $10.00 per car-load of 30,000 pounds, and when the road reached the different mills the rate for shipments of lumber originating on said railroad at Corbin, Ogden, and other

points were regulated, and so understood by the shippers to points on other railroads beyond Texarkana, in accordance with such traffic arrangements as might exist from time to time between the defendant and its connecting carriers at Texarkana. It was customary for the connecting roads leading out of Texarkana to allow the defendant certain pro rates on all shipments of lumber originating on defendant's line, and the defendant gave the shippers on its said line the benefit of such pro rates. When said pro rates amounted to as much as four cents per hundred pounds the defendant allowed the shippers on its line the same through rate as were enjoyed by the shippers from Texarkana. When such pro rates were less that 4 cents per hundred pounds the defendant charged shippers on its line an "arbitrary" of an amount sufficient to make up said 4 cents. Lumber cannot be transported from Rankin or other points on defendant's line to Texarkana, without loss to the railroad, at a less rate than 4 cents per hundred pounds. In November, 1892, the defendant's connecting carriers at Texarkana all withdrew their pro rate arrangement with the defendant and ceased to allow it any pro rates at all; whereupon the defendant, after fifteen days' previous notice, established and published at all stations along
75 its line a rate of three cents per hundred pounds on all shipments of lumber to Texarkana. The defendant's regular established rates varied from 2 and 3 to 4 cents per hundred during the time complained of by the plaintiff in accordance with the pro rate allowed to it by the connecting carriers, and the defendant has demanded of and collected from the plaintiff the same rate for transportation of his lumber as were contemporaneously charged other shippers and the public in general under the same circumstances and conditions and no more.

In December, 1891, W. A. Williams became general manager of and the only authorized traffic agent of the defendant. In December, 1892, the defendant company was reorganized and its properties and franchises and securities were purchased by the present management of the road, who had no notice or knowledge of the existence of the contract sued on. The defendant's tariff rates on shipments of lumber from points along its line were regularly furnished to plaintiff, who knew at the time he made each shipment complained about the established rate which would be charged himself as well as the rest of the public. After plaintiff made his first shipment at the three-cent rate, which shipment was on January 12, 1893, from Rankin to La Junta, Colorado, and after said shipment had been delivered to the consignees the plaintiff wrote to Whitaker and to W. A. Williams, general manager and traffic agent, protesting against the rate which had been charged and calling attention to the contract which had been executed by Whitaker.

This was the first that Williams or the management of the road at that time knew of the existence of the contract, and Williams at once interviewed Kizer and repudiated the contract as illegal, and notified Kizer that he would be charged on all shipments the same rates as other shippers were charged, and that he must be governed

by the regularly established rates of the defendant as promulgated from time to time.

After which the plaintiff made the shipments mentioned
76 in his original and amended complaint, whereon he was charged by the defendant the sums mentioned in said complaints in excess of the rate specified in the contract sued upon. But the charges made in all cases were in accordance with the regularly established and adopted tariff rates of the defendant.

To the foregoing finding of facts the plaintiff at the time objected; which objection was by the court overruled, and to this plaintiff excepted.

Conclusions of Law.

The court concludes that the contract sued upon in this case is void and cannot be enforced, and inasmuch as the plaintiff has paid no more than the other shippers under the same circumstances and conditions, such contract is unlawful and prohibited by the interstate-commerce act and is void.

W. P. FEAZEL, *Judge.*

To the foregoing declaration of law as stated by the court the plaintiff at the time objected; which objection was by the court overruled; to which the plaintiff at the time excepted.

And thereupon *thereupon* the court rendered judgment against the plaintiff, and thereafter, on the 17th day of July, 1896, in apt time, the plaintiff filed herein his motion for a new trial; which motion is in words and figures as follows, to wit:

Little River Circuit Court.

J. B. KIZER, Plaintiff,
vs.
TEXA. & FT. S. R'Y CO., Defendant.

Plaintiff moves the court to set aside the judgment in this cause and to grant a new trial:

1st. Because the judgment is contrary to the evidence.
77 2nd. Because the judgment is contrary to the law.
3rd. Because the judgment is contrary to the law and evidence.

4th. Because the court erred in declaring the law as asked by the defendant and as set forth in the first declaration of law made.

5th. Because the court erred in refusing to declare the law as asked by plaintiff and set forth in declaration of law asked by plaintiff and in refusing to give such declaration.

6th. Because the court erred in its conclusions of law.

7th. Because the court erred in its findings of fact.

SCOTT & JONES, *For Pl'ff.*

And said motion for a new trial coming on to be heard, after argument of counsel *and* the court, being sufficiently advised, doth

overrule the same; which judgment of the court in overruling said motion for a new trial the plaintiff at the time excepted, and, upon motion, the plaintiff is granted sixty days from this date in which to tender and file his bill of exceptions herein.

And now, within the time allowed by the court in which to file its bill of exceptions, the plaintiff presents this his bill of exceptions, which is examined, found correct as containing all the evidence, findings of fact, and declarations of law in said cause, and is accordingly approved, signed, and certified as true and correct bill of exceptions in said cause and ordered and declared to be a part of the record herein.

Witness my hand this — day of August, A. D. 1896.

W. P. FEAZEL,
Judge of the 9th Judicial Circuit of Arkansas.

(Filed Aug. 15th, 1896.)

78 STATE OF ARKANSAS, }
Little River County. }

I, Ed. J. Cheever, circuit clerk in and for the county and State aforesaid, do hereby certify that the annexed and foregoing 54 pages contain a true and complete transcript of all the record, papers, and proceedings had in the case of A. J. Kizer *vs.* The Texarkana & Ft. Smith Railway Company as the same appears of record and on file in my office.

In testimony whereof witness my hand and official seal this the 24th day of Auguest, 1896.

[SEAL.]

ED. J. CHEEVER, *Clerk*,
By JAMES D. HEAD, *D. C.*

79

To amount of fees due to Ed. J. Cheever, clerk.....	6.60
Amount of fees for certifying transcript, 20,000 words, at 10 cents per hundred.....	20.00
Index to transcript.....	.50
Certificate to transcript.....	.50
Certificate to cost bill.....	.50
	$28.10
To amount due to H. G. Sanderson, sheriff.....	2.10
Total amount due.....	$30.20

Received payment in full of the above cost bill this the 24th day of August, 1896.

ED. J. CHEEVER, *Clerk*,
By JAS. D. HEAD, *D. C.*

STATE OF ARKANSAS, }
Little River County. }

I, Ed. J. Cheever, circuit clerk within and for the county and State aforesaid, do hereby certify that the annexed and foregoing

page contains a true account of all the costs in the case of A. J. Kizer *vs.* Texarkana & Ft. S. R'y Co. as the same appears on page 265 of Fee Book "C" of the records of Little River county, Arkansas.

Witness my hand and seal as such clerk this the 24th day of August, A. D. 1896.

[SEAL.] ED. J. CHEEVER, *Clerk*,
By JAS. D. HEAD, *D. C.*

80 Endorsed on transcript.

Comes A. J. Kizer, the appellant herein, and prays an appeal from the within judgment to the supreme court of Arkansas.

Aug. 29, 1896.

SCOTT & JONES,
Att'ys for Def't.

August 31st, 1896.
Appeal granted.
W. P. CAMPBELL, *Clerk.*

81 STATE OF ARKANSAS:

In the Supreme Court.

Be it remembered that at a term of the supreme court of the State of Arkansas begun and held at the court-house, in the city of Little Rock, the capital of said State, on the 22nd day, being the 4th Monday, of November, A. D. 1897, were the following proceedings, viz:

A. J. KIZER, Appellant,
vs.
TEXARKANA & FORT SMITH RAILWAY COMPANY, Appellee.

Appeal from the Little River circuit court.

Come the parties, by attorneys, and by consent this cause is passed to May 9th next.

And on May 9th, 1898, the following proceedings were had:

A. J. KIZER, Appellant,
vs.
TEXARKANA & FORT SMITH RAILWAY COMPANY, Appellee.

Appeal from Little River circuit court.

Comes the parties, by attorneys, and by consent this cause is passed to May 16th for oral argument.

And on May 16th, 1898, the following proceedings were had:

A. J. KIZER, Appellant,
vs.
TEXARKANA & FORT SMITH RAILWAY COMPANY, Appellee.

Appeal from Little River circuit court.

Come the parties, by attorneys, and after oral argument by attorneys this cause is submitted upon the briefs filed and by the court taken under advisement.

82 STATE OF ARKANSAS:

In the Supreme Court.

Be it remembered that at a term of the supreme court of the State of Arkansas begun and held at the court-house, in the city of Little Rock, the capital of said State, on the 28th day, being the fourth Monday, of November, A. D. 1898, the following proceedings were had, to wit:

A. J. KIZER, Appellant,
vs.
TEXARKANA & FORT SMITH RAILWAY COMPANY, Appellee.

Appeal from Little River circuit court.

This cause came on to be heard upon the transcript of the record of the circuit court of Little River county and was argued by counsel; on consideration whereof it is the opinion of the court that there is no error in the proceedings and judgment of said circuit court in this cause.

It is therefore considered by the court that the judgment of said circuit court in this cause rendered be, and the same is hereby, in all things affirmed with costs.

It is further considered that said appellee recover of said appellant all its costs in this court in this cause expended and have execution thereof.

Wood & Riddick, JJ., dissent.

83 *Opinion.*

In the Supreme Court of Arkansas, April 15, 1899.

KIZER
v.
TEXARKANA & FT. SMITH R'Y CO. } No. 95.

This is an action to recover from the railway company an amount which the appellant alleges was exacted of and paid by him for freights on lumber which he shipped over appellee's road in excess of the amount stipulated for by him in a contract made by him with the appellee, which contract is as follows, to wit: "State of Texas, Bowie county. This agreement, by and between W. L. Whitaker,

as president, manager, and owner of the Texarkana & Ft. Smith Railway Company, of the first part, and A. J. Kizer, for himself and his associates, heirs, successors, and assigns, of the second part, witnesseth: (1) That the party of the second part, individually or associated with others in partnership or incorporation as he may elect, agrees to construct and maintain a saw-mill in Little River county, on the line of said railway, for the manufacture of pine, oak, and other kinds of lumber, at a point already selected by the party of the second part. (2) That the party of the second part agrees, in consideration of the foregoing and for and in behalf of said railway and said company, to furnish cars and ship all lumber manufactured by said mill for said party of the second part, for his heirs, successors, and assigns of said mill, over all routes over which lumber is usually shipped from Texarkana, Texas, and Arkansas, at a rate not to exceed two cents per hundred pounds over the rates charged by the different railway companies from Texarkana. This contract to be in force until January 1st, eighteen hundred and ninety-seven (1897) A. D. [Seal.] Texarkana & Ft. Smith R'y Co., by W. L. Whitaker, president." Exhibit B to the complaint is an itemized account showing an overcharge, commencing January 12, 1893, and ending December 27, 1894, on 346 cars of lumber, and the entire amount of these overcharges was $1,304.15. Summons was issued December 20, 1895. To the foregoing complaint, an amendment was filed setting forth 146 similar overcharges that were made during the year 1895, and amounting to the sum of $566.23. The defendant's answer denied that it executed the written contract, Exhibit A to the complaint, and alleged the same was not its act and deed. It denied that it overcharged the plaintiff upon his said shipments in the sum of two cents per 100 or in any amount, and averred that it never charged plaintiff anything except the usual, customary, and reasonable rates. That, if said Whitaker ever executed said contract, it was without authority from defendant or its board of directors, and was *ultra vires* and an illegal act on the part of said Whitaker; that the rate mentioned in said contract was less than the established and reasonable regular rates charged by the defendant for similar services; and that the defendant's regular tariff rates were and are in all respects reasonable, and the rate mentioned in said contract was unreasonable, and would constitute an unlawful discrimination against the rest of the public; all of said traffic being interstate, and said contract void and incapable of enforcement. This answer was verified by W. A. Williams, who stated therein that he was the general manager and authorized agent of the defendant, and who stated that he believed the averments therein to be true. To this answer, an amendment was filed which alleged that the defendant's line of railway between Rankin and Texarkana is an interstate line of road, its portion north of Red river being in Little River county, Ark., and the portion south of Red river being in Bowie county, Tex., and all shipments from Rankin to Texarkana are interstate shipments. It denied that it demanded, or that plaintiff paid it, any amount by reason of the shipments mentioned in

the original or amended complaint except what was justly and legally due the defendant, etc.

The facts as found by the court, sitting as a jury, are as follows, to wit:

"The court finds that on the 10th day of September, 1891, the plaintiff and defendant entered into a contract in writing, whereby plaintiff agreed to construct and maintain a saw-mill in Little River county, Arkansas, on the line of defendant's road, at a point already selected by plaintiff, for the manufacture of pine, oak, and other kinds of lumber, and the defendant agreed on its part to furnish cars and ship all lumber manufactured by said mill for plaintiff, over all roads over which lumber is usually shipped from Texarkana, Texas, and Arkansas, at a rate not to exceed 2 cents per hundred pounds over the rates charged by the different railroad companies from Texarkana, and that plaintiff has in all things complied with his part of said contract; but that defendant from and after the 30th of November, 1892, has refused to ship such lumber for plaintiff at the contract price, but has charged plaintiff a greater rate for shipping said lumber than the rate provided by the contract, and that plaintiff was compelled to pay such higher rate, in order to get his lumber shipped. That the contract was executed on the part of the defendant by W. L. Whitaker, who was then the president and general manager of the defendant company, and as such had authority to make freight rates and to execute a contract fixing the rate for shipment of freight; that at the time the contract was entered into the defendant's road was not completed to Rankin, the point where plaintiff's mill was located, and that no freight rates had been established in Arkansas for the shipment of freight for that point; that defendant did establish the following rates, November 15, 1892, to take effect November 30, 1892: Not to exceed three cents per 100 pounds from any point on defendant's road to Texarkana. When said instrument was signed by Whitaker it was contemplated that plaintiff and William Buchanan and B. T. Estes should be associated with him in the establishment of the saw-mill mentioned in said instrument. Buchanan and Estes were directors of the defendant company, and Whitaker was its president and general manager at that time. The contract was written by Estes, who is the plaintiff's father-in-law. The defendant company then had its regularly constituted board of nine
84 directors. There was no action of said board of directors authorizing or ratifying the execution of said contract made by Whitaker shown by the minutes of the company. In September, 1891, the defendant's railroad extended from Texarkana northward through Bowie county, in the State of Texas, and across Red river, past Ogden, in Little River county, Arkansas,—a distance of about 15 miles,—and, at the time of the execution of said contract by Whitaker, saw-mills were located on the line of said railroad at Corbin, Texas, and Ogden, Arkansas, and other points. Plaintiff had selected and established the site for his saw-mill at Rankin, about 25 miles north of Texarkana, in 1890, before the contract sued on was executed. The defendant's road was in process of construction

northward, and was completed to Rankin in December, 1891. As soon as the road reached Rankin, the plaintiff put in his saw-mill there, and by agreement between himself and defendant became, and has ever since been and still is, the defendant's regular local agent at said town of Rankin, and as such agent had and has control of defendant's local freight and passenger business at that point. When the contract sued on was signed by Whitaker, the defendant's regular tariff rate for transportation from Corbin to Texarkana charged and collected from the mill-owners at Corbin was $10 per car of 30,000 pounds, and when the road reached the different mills the rates for shipments of lumber originating on said railroad at Corbin, Ogden, and other points were regulated and so understood by the shippers to points on other railroads beyond Texarkana, in accordance with such traffic arrangements as might exist from time to time between the defendant and its connecting carriers at Texarkana. It was customary for the connecting roads leading out of Texarkana to allow the defendant certain pro rates on all shipments of lumber originating on defendant's line, and the defendant gave the shippers on its said line the benefit of such pro rates when said pro rates amounted to as much as four cents per hundred pounds. The defendant allowed the shippers on its line the same through rates as were enjoyed by the shippers from Texarkana. When such pro rates were less than 4 cents per hundred pounds, the defendant charged shippers on its line an arbitrary of an amount sufficient to make up said 4 cents. Lumber cannot be transported from Rankin or other points on defendant's line to Texarkana without loss to the railroad at a less rate than 4 cents per hundred pounds. In November, 1892, the defendant's connecting carriers at Texarkana all withdrew their pro rate arrangements with the defendant, and ceased to allow it any pro rates at all; whereupon the defendant, after fifteen days' previous notice, established and published at all stations along its line a rate of three cents per hundred pounds on all shipments of lumber to Texarkana. The defendant's regular established rates varied from 2 and 3 to 4 cents per hundred, during the time complained of by the plaintiff, in accordance with the pro rate allowed it by the connecting carriers, and the defendant has demanded of and collected from the plaintiff the same rates for transportation of his lumber as were contemporaneously charged other shippers and the public in general under the same circumstances and conditions, and no more. In December, 1891, W. A. Williams became general manager and the only authorized traffic agent of the defendant. In December, 1892, the defendant company was reorganized, and its properties and franchises and securities were purchased by the present management of the road, who had no notice or knowledge of the existence of the contract sued on. The defendant's tariff rates on shipments of lumber from points along its lines were regularly furnished to plaintiff, who knew at the time he made each shipment complained about the established rate which would be charged himself as well as the rest of the public. After plaintiff made his first shipment at the three-cent rate, which shipment was on January 12, 1893, from Rankin to La

Junta, Colorado, and after said shipment had been delivered to the consignees, the plaintiff wrote to Whitaker and to W. A. Williams, protesting against the rate, and calling attention to the contract which had been executed by Whitaker. This was the first that Williams or the management of the road knew of the existence of the contract, and Williams at once interviewed Kizer and repudiated the contract as illegal, and notified Kizer that he would be charged the same rates as other shippers were charged, and that he must be governed by the regularly established rates of the defendant as promulgated from time to time. After which, the plaintiff made the shipments mentioned in his original and amended complaint, wherein he was charged by the defendant the sums mentioned in said complaints in excess of the rate specified in the contract sued upon. But the charges made in all cases were in accordance with the regularly established and adopted tariff rates of the defendant."

The plaintiff objected to the foregoing finding of facts; and, the objections being overruled, the exceptions were saved. And thereupon the court declared the law as follows: "The court concludes that the contract sued upon in this case is void and cannot be enforced; and, inasmuch as the plaintiff has paid no more than the other shippers under the same circumstances and conditions, such contract is unlawful and prohibited by the interstate-commerce act, and is void." To this declaration of law, the plaintiff objected; and, his objections being overruled, he excepted. Judgment being rendered for the defendant, the plaintiff filed his motion for a new trial in apt time, setting forth in said motion the following grounds: (1) Because the judgment is contrary to the evidence; (2) because the judgment is contrary to the law; (3) because the judgment is contrary to the law and evidence; (4) because the court erred in its declaration of law; (5) because the court erred in refusing to declare the law as asked by the plaintiff; (6) because the court erred in its conclusions of law; (7) because the court erred in its findings of fact. This motion was by the court overruled, and exceptions duly saved. The bill of exceptions was filed in proper time, and appeal has been taken to this court.

HUGHES, *J.*:

We are of the opinion that the facts in this case as found by the court, as set out in the statement of facts, show that the contract upon which the appellant relies is within the prohibition of sections 1, 2, and 3 of the interstate-commerce law enacted by Congress. The sections of this law invoked by appellee are as follows:

85 "SECTION 1. All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonabe charge for such service is prohibited and declared to be unlawful.

"SEC. 2. That if any common carrier subject to the provisions of

this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

"SEC. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." 24 Stat., 379.

The shipments from Rankin to Texarkana for overcharges on which appellant brought this action were interstate commerce. The evidence tends to show, and the court found, that the appellant's lumber could not have been shipped from Rankin to Texarkana at a less rate than four cents per 100 pounds without loss to the railroad; that appellee charged the appellant the same rate as it charged other shippers under like circumstances and conditions, and no more, which varied from two and three to four cents per 100 in accordance with the *pro rata* allowed it by connecting carriers. This contract on which appellant relies proposed to allow appellant a special rate, in no event to exceed two cents per 100 pounds. This would give appellant an unreasonable preference and advantage over other shippers of lumber in the same county of from one to two cents per 100 pounds. There was no other railroad through that county, and there were several mills shipping lumber over said road between Rankin and Texarkana.

This contract appears to be plainly within the above-quoted provisions of the interstate-commerce law. These provisions place "special rates, rebates, drawbacks and other devices" under the same prohibition, and make such unlawful in express terms. "It has been adjudged in many cases that, when these circumstances arise, the contract which was entered into by the parties in this action is contrary to public policy, and cannot be enforced." Bullard *v.* Railroad Co. (Mont.), 25 Pac., 120, and cases there cited. "An agreement by a railroad company to carry goods for certain persons at a cheaper rate than it will carry under the same conditions for others is void, as creating an illegal preference." Messenger *v.* Railroad Co., 36 N. J. Law, 407. In Atkinson *v.* Ritchie, 10 East, 530, Lord Ellenborough, C. J., said in the opinion: "That no contract can be properly carried into effect which was originally made contrary to the provisions of the law, or which, being made consistently with the rules of law at the time, has become illegal in

virtue of some subsequent law, are propositions which admit of no doubt." Prof. Pomeroy writes: "An illegal contract is, as a rule, void, not merely voidable, and can be the basis of no judicial proceeding. No action can be maintained upon it either at law or in equity." Pom. Cont., § 280. "The principles which have been stated are applicable to the act of Congress to regulate commerce and the contract which has been described." Bullard *v.* Railroad Co. (Mont.), 25 Pac., 120.

We think the contract relied on in this case is prohibited by the act of Congress to regulate commerce, and is void. The judgment is affirmed.

Wood and Riddick, JJ., dissent.

BUNN, *C. J.*:

I concur in the decision and opinion of the court for the reasons therein stated, and for the additional reason that the defendant railway company, which is the successor of the company formerly owning the road, and alleged to have been represented by Whitaker, had no notice of the existence of the special freight contract said to have been made with the lumber company by Whitaker, as agent of the predecessor company, and the same not constituting a lien on the property of the road.

86 And on the 24th of April, 1899, the following proceedings were had, to wit:

A. J. KIZER, Appellant,
vs.
TEXARKANA & FORT SMITH RAILWAY COMPANY, Appellee.

Appeal from Little River circuit court.

Comes the appellant, by his attorneys, and files his petition for a rehearing of this cause.

87 In the Supreme Court of the State of Arkansas.

A. J. KIZER, Appellant,
vs.
THE TEXARKANA & FT. SMITH RAILWAY COMPANY, Appellee. } No. 3452.

Motion for Rehearing.

Comes the appellant, who prays the court to overrule the opinion hereinbefore rendered in this cause and grant a rehearing for the following reasons:

1. Because the court erred in holding and deciding that the contract, the basis of this suit, is invalid and void because it is adjudged to be in conflict with section 1 of the Interstate Commerce Commission act of the Congress of the United States.

2. Because the court erred in holding and deciding that said con-

tract is illegal and void because in conflict with section 2 of said Interstate Commerce Commission act.

3. Because the court erred in holding and deciding that said contract is illegal and void because in conflict with section 3 of said Interstate Commerce Commission act.

4. Because this court erred in holding and deciding that said contract is illegal and void because in conflict with sections 1, 2, and 3 of said Interstate Commerce Commission act.

5. Because this court erred in holding and deciding that the contract relied on in this case is prohibited by the act of Congress to regulate commerce and is void.

Respectfully submitted.

SCOTT & JONES,
Attorneys for Appellant.

We certify that in our opinion the foregoing motion is meritorious.

OSCAR D. SCOTT.
PAUL JONES.

Filed April 24th, 1899.

P. D. ENGLISH, *Clerk.*

88 And on the 29th day of April, 1899, the following proceedings were had, to wit:

A. J. KIZER, Appellant,
vs.
TEXARKANA & FORT SMITH RAILWAY COMPANY, Appel-ee.

Appeal from Little River circuit court.

The court being sufficiently advised, the petition for a rehearing herein is overruled.

89 In the Supreme Court of Arkansas.

A. J. KIZER, Appellant,
vs.
THE TEXARKANA & FT. SMITH RAILWAY COMPANY, Appellee. } No. 3452.

Bond.

Know all men by these presents that we, A. J. Kizer, as principal, and Ed. F. Burk and P. J. Ahern, as sureties, are held and firmly bound unto the Texarkana & Ft. Smith Railway Company in the full and just sum of five hundred ($500.00) dollars, to be paid to the said Texarkana & Ft. Smith Railway Company, its successors or its certain attorneys or assigns; to which payment, well and truly to be made, we firmly bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seal- and dated this the 3rd day of July, in t
year of our Lord one thousand eight hundred and ninety-nine.

Whereas lately, in the supreme court of Arkansas, in a suit pen
ing in said court, wherein A. J. Kizer as plaintiff and appellant a
The Texarkana & Ft. Smith Railway Company is defendant a
appellee, judgment was rendered against said plaintiff and app
lant, A. J. Kizer, and the said A. J. Kizer having obtained a w
and filed a copy thereof in the clerk's office of the said supre
court of Arkansas to reverse the judgment in the aforesaid suit, a
a citation directed to the Texarkana & Ft. Smith Railway Compa
citing and admonishing *him* to be and appear at the Supreme Co
of the United States, to be holden at Washington, within thirty da
from the 3rd day of July, 1899:

Now, the condition of the above litigation is such that if the sa
A. J. Kizer shall prosecute this writ to effect and assume all da
ages and costs if he fails to make his plea good, then the abo
obligation to be void; else to remain in full force and virtue.

A. J. KIZER.
ED. F. BURK.
P. J. AHERN.

STATE OF ARKANSAS, }
County of Miller. }

We, Ed. F. Burke and P. J. Ahern, sureties upon the foregoi
bond, each upon oath says that he is a citizen of the State of A
kansas and has property in said State subject to execution in exce
of his exemptions and liabilities in the sum of five hundred ($500.0
dollars.

ED. F. BURK.
P. J. AHERN.

Subscribed and sworn to before me this 3rd day of July, 1899.
[SEAL.] S. S. SOLINSKY,
Notary Public, Miller Co., Ark.

My commission expires Jan. 14, 1901.

Bond approved.

H. G. BUNN,
Chief Justice Sup. Court of Ark.

Approved July 5th, 1899, and filed.
PEYTON D. ENGLISH, *Clerk.*

90 STATE OF ARKANSAS:

In the Supreme Court.

I, Peyton D. English, clerk of the supreme court of t
State of Arkansas, hereby certify that the foregoing 89 pages,
to 89, and pages I to X contain a full, true, and complete transcri
of the record and proceedings in said court in the cause therei
stated.

Seal of the Supreme Court of Arkansas.

In testimony whereof I hereto set my hand as clerk and affix the seal of said court, at my office, in Little Rock, Arkansas, this 12th day of July, A. D. 1899.

PEYTON D. ENGLISH, *Clerk.*

[Ten-cent U. S. internal-revenue stamp, canceled 7, 12, '99. P. D. E.]

Fees.

W. P. Feild, clerk U. S. ct. ct., $2.50, paid by plaintiff in error.
P. D. English, clerk sup. ct., $30.00 " " " "

Costs taxed in supreme court:

Due appellee printing briefs, $15.00.

[Seal of the Supreme Court of Arkansas.]

Attest:

P. D. ENGLISH, *Clerk.*

Endorsed on cover: File No., 17,467. Arkansas supreme court. Term No., 353. A. J. Kizer, plaintiff in error, *vs.* The Texarkana & Fort Smith Railway Company. Filed July 18th, 1899.

1307

No. 100.

Brief of Scott for

Office Supreme Court U. S.
FILED
DEC 2 1900
JAMES H. McKENNEY,
Clerk.

Filed Oct. 20, 1900.

United States Supreme Court

October Term 1900.

A. J. KIZER,	Plaintiff in Error,
VS.	
THE TEXARKANA & FT. SMITH RAILWAY COMPANY.	Defendant in Error.

In Error to the Supreme Court of Arkansas.

BRIEF FOR PLAINTIFF IN ERROR.

OSCAR D. SCOTT,
Attorney for Plaintiff in Error.

CHAUNCEY PRINTING CO., TEXARKANA.

United States Supreme Court

October Term 1900.

A. J. KIZER, } Plaintiff in Error,
VS.
THE TEXARKANA & FT. SMITH RAILWAY COMPANY. } Defendant in Error.

In Error to the Supreme Court of Arkansas.

BRIEF FOR PLAINTIFF IN ERROR.

On the 16th day of September, 1891, the parties hereto entered into the following written contract, viz.

STATE OF TEXAS, }
BOWIE COUNTY. } This agreement by and between W. L. Whitaker, as President, Manager and Owner of the Texarkana & Ft. Smith Railway Company of the first part, and A. J. Kizer for himself and his associates, heirs, successor and assigns of the second part, witnesseth.

1. That the party of the second part, individually or associated with others in partnership or incorporation as he may elect, agrees to construct and maintain a saw mill in Little River County, on the line of said railway, for the manufacture of pine, oak and other kinds of lumber, at a point already selected by the party of the second part.

2. That the party of the second part agrees in consideration of the foregoing, and for and on behalf of said railway and said company to furnish cars and ship all lumber manufactured by said mill for said party of the second part, for his heirs, successors and assigns of said mill over all routes on which lumber is usually shipped from Texarkana, Texas and Arkansas, at a rate not to exceed two cents per hundred pounds over the rates charged by the different railway companies from Texarkana.

This contract to be in force until January 1st eighteen-hundred and ninety-seven, (1897) A. D.

SEAL

Texarkana Ft. Smith Railway Co.,
By W. L. Whitaker, President.

Printed Record pp. 6, 21 and 54.

The place designated and where the mill was afterwards located was Rankin, in Little River County, Arkansas. At the time of the entering into this contract, the railway had not been completed to Rankin, and Kizer had cleared off the ground for a mill site at that place, and obtained options on timber or timber lands near there. The railroad was only completed to Ogden, Arkansas, in September, 1891. Ogden is 13 miles from Texarkana, Rec. 50, and Rankin is 23 miles from Texarkana, Rec. 50 and 30, to which point the railroad was completed in December 1891. Immediately upon the completion of the road to Rankin, Kizer shipped his saw mill to that place, put the same in operation, and ever afterwards operated it in compliance with his undertaking in said contract. The railway company hauled all the lumber shipped from this mill under the terms and at the rate stipulated until November 30th 1892. Rec. 55, 56. After making the con-

tract Kizer purchased 10,000 or 12,000 acres of land in Little River County. The capacity of his mill was 35,000 feet per day and the average output of the mill per month, between 550,000 and 600,000 feet. Rec. 23. At the time of the execution of the contract the defendant had no established tariff freight rates from Rankin. Rec. 55. The shipment from Rankin, which is in the State of Arkansas, over the line of the Texarkana & Ft. Railway which crosses Red River from Arkansas into Texas is Interstate Commerce. In December 1892 the railway commenced charging Kizer more than the contract price for hauling his lumber, and he at once in writing protested and called the attention of the Railway Company to the overcharge, Rec. 56. In the shipment of lumber, the same is sold to be delivered at various points at a certain price. The freight is paid by the seller, but as a matter of fact, the freight is advanced by the purchaser to the Railway Co., that makes delivery, and the purchaser then credits himself for the freight paid upon the purchase price of the lumber. Of course the freight rates charged upon these expense bills must be paid before delivery of the lumber, Rec. 25. The defendant continued to make overcharges which amounted to $1304.15 up to the time of the institution of the suit and subsequently and before the trial other overcharges to the amount of $566.23 had been made and all paid by Kizer. These last overcharges were brought into this suit by an amendment to the complaint, and the suit was to recover all these overcharges, Rec. 57 and 5 to 17 inclusive. The answer of the Railway Co. alleged among other things that the traffic was interstate commerce, that the contract sued on was unreasonable and constituted an unlawful discrimination

against the rest of the public and that the contract was void. Rec. 18. The cause was tried before the Circuit Court of Little River County, Arkansas, without a jury, and that Court made the following written findings of fact and declaration of law.

"The Court finds that on the 15th day of September 1891, the plaintiff and defendant entered into a contract in writing whereby plaintiff agreed to construct and maintain a saw mill in Little River County, Arkansas, on the line of defendant's road, already selected by plaintiff for the manufacture of pine, oak, and other kinds of lumber, and the defendant agreed on its part to furnish cars and ship all lumber manufactured by said mill for plaintiff on all roads over which lumber is usually shipped from Texarkana Texas and Arkansas at a rate not to exceed two cents per hundred pounds over the rates charged by the different railroad companies from Texarkana, and that plaintiff has in all things complied with his part of said contract, but that defendant from and after the 30 day of November, 1892, has refused to ship such lumber for plaintiff at the contract price, but has charged plaintiff a greater rate for shipping said lumber than the rate provided by such contract, and that plaintiff was compelled to pay such higher rate in order to get his lumber shipped. That the contract was executed on the part of the defendant by W. L. Whitaker, who was then the President and General Manager of the defendant company and as such had authority to make freight rates and to execute a contract fixing the rate for shipment of freight, that at the time the contract was entered into, the defendants road was not completed to Rankin, the point where plaintiffs' mill was located and that no freight rates had been established in Arkansas for the shipment

of freight for that point; that defendant did establish the following rates November 15th 1892 to take effect November 30th 1892, not to exceed three cents per hundred pounds from any point on defendant's road to Texarkana. When said instrument was signed by Whitaker it was contemplated that the plaintiff and Wm. Buchanan and B. T. Estes should be associated with him in the establishment of the saw mill mentioned in said instrument. Buchanan and Estes were directors the defendant company, and Whitaker was its president and general manager at that time. The contract was written by Estes, who is the plaintiff's father-in-law. The defendant company then had its regular constituted board of nine directors. There was no action of said board of directors authorizing or ratifying the execution of said contract made by Whitaker shown by the minutes of the company. In September 1891 the defendant's railroad extended from Texarkana northward through Bowie County in the State of Texas, and across Red River past Ogden in Little River County, Arkansas, a distance of about fifteen miles and at the time of the execution of said contract by Whitaker, saw mills were located on the line of said railroad at Corbin, Texas, at Ogden Arkansas, and other points. Plaintiff had selected and established the site for his saw mill at Rankin, about 25 miles north of Texarkana, in 1890 before the contract sued upon was executed. The defendant's road was in process of construction northward and was completed to said Rankin in December 1891. As soon as the road reached Rankin the plaintiff put in his saw mill there and by agreement between himself and defendant became and has ever since been and still is the defendant's regular local agent at said town of Rankin, and as

such agent had and has control of defendant's local and passenger business at that point. When the contract sued on was signed by Whitaker the defendant's regular tariff rate for the transportation of lumber from Corbin to Texarkana charged and collected from the mill owners at Corbin was $10.00 per car of 30,000 pounds, and when the road reached the different mills the rate for shipments of lumber originating on said railroad at Corbin, Ogden and other points were regulated, and so understood by the shippers to points on other railroads beyond Texarkana in accordance with such traffic arrangements as might exist from time to time between the defendant and its connecting carriers at Texarkana. It was customary for the connecting roads leading out of Texarkana to allow the defendant certain pro rates on all shipments of lumber originating on defendants line and the defendant gave the shippers on its line the benefit of such pro rates. When such pro rates amounted to as much as four cents per hundred pounds the defendant allowed the shippers on its line the same through rate as were enjoyed by the shippers from Texarkana. When such pro rates were less than four cents per hundred pounds the defendant charged shippers an "arbitrary" of an amount sufficient to make up said 4 cents. Lumber cannot be transported from Rankin and other points on defendant's line to Texarkana, without loss to the railroad at a less rate than 4 cents per hundred pounds. In November 1892 the defendant's connecting carriers all withdrew their pro rate arrangements and ceased to allow it any pro rates at all; whereupon the defendant, after fifteen days previous notice, established and published at all stations along its line a rate of three cents per hundred pounds on all shipments of lum-

ber to Texarkana. The defendant's regular established rates varied from 2 and 3 to 4 cents per hundred during the time complained of by the plaintiff in accordance with the pro rate allowed to it by the connecting carriers, and the defendant has demanded of and collected from the plaintiff the same rate for transporation of his lumber as were contemporaneously charged other shippers and the public in general under the same circumstances and conditions and no more.

In December 1891 W. A. Williams became general manager of and the only authorized traffic agent of the defendant. In December 1892 the defendant company was re-organized and its properties and franchises and securities were purchased by the present management of the road, who had no notice or knowledge of the existence of the contract sued on. The defendant's tariff rates on shipments of lumber from points along its line were regularly furnished to plaintiff, who knew at the time he made each shipment complained about the established rate which would be charged himself as well as the rest of the public. After plaintiff made his first shipment at the 3 cent rate, which shipment was on January 12th 1893, from Rankin to La Junta, Colorado, and after said shipment had been delivered to the consignees, the plaintiff wrote to Whitaker and to W. A. Williams, general manager and traffic agent, protesting against the rate which had been charged, and calling attention to the contract which had been executed by Whitaker. This was the first that Williams or the management of the road at that time knew of the existence of the contract, and Williams at once interviewed Kizer and repudiated the contract as illegal, and notified Kizer that he would be charged on

all shipments the same rates as other shippers were charged, and that he must be governed by the regular established rates of the defendant as promulgated from time to time. After which the plaintiff made the shipments mentioned in his original and amended complaint, whereupon he was charged by the defendant the sums mentioned in said complaints in excess of the rate specified in the contract sued upon. But the charges made in all cases were in accordance with the regularly established and adopted tariff rates of the defendant." Rec. 54-57.

CONCLUSIONS OF LAW.

"The Court concludes that the contract sued upon in this case is void and cannot be enforced, and inasmuch as the plaintiff has paid no more than the other shippers under the same circumstances and conditions, such contract is unlawful and prohibited by the interstate commerce act, and is void" Rec. p. 57. To this declaration of law Kizer at the time excepted, Judgment was rendered in favor of the Railway Co. Kizer filed his motion for a rehearing, setting forth therein that the Court erred in its declaration of law, which being overruled, he appealed to the Supreme Court of Arkansas where the judgment was affirmed by a divided Court, and in the opinion of the Court affirming the same it is stated; "We are of the opinion that the facts as found by the Court as set out in the statement of facts, show that the contract upon which the appellant relies is within the prohibitions of sections 1, 2 and 3 of the interstate commerce law enacted by Congress."

And again, "This contract upon which appellant relies, proposed to allow appellant a special rate, in no event to exceed two cents per hundred pounds. This would give appellant

an unreasonable preference and advantage over other shippers of lumber in the same county of from one to two cents per hun- pounds." Also at the conclusion of the opinion, "We think the contract relied on in this case is prohibited by the act of Congress to regulate commerce, and is void." Rec. p 60.

Kizer moved for a rehearing setting forth that the Court erred in holding that the contract relied on was prohibited by the act of Congress to regulate commerce. Rec. 66. This motion for a rehearing was overruled and Kizer has sued out a writ of error to this Court.

THE ASSIGNMENT OF ERRORS SET FORTH.

1. "That the Court erred in holding that the facts in this case as found by the Lower or Circuit Court as set out in the statement of facts show that the contract upon which plaintiff, Kizer relies is within the prohibition of sections one, two and three of the interstate commerce law enacted by Congress.

2. The Court erred in holding that the contract to allow appellant, Kizer, a special rate in no event to exceed two cents per hundred pounds, would give him an unreasonable preference and advantage over all other shippers of lumber in the same county.

3. The Court erred in holding and deciding that said contract was within the provisions of the interstate commerce law.

4. The Court erred in holding that the contract relied on in this case is prohibited by the act of congress to regulate commerce.

5. The Court erred in holding that said contract was void by reason of the provision of said interstate commerce act.

6. The Court erred in rendering a decree and entering

judgment in favor of the defendant and against the plaintiff. R. 4.

There is but one single question presented: Was this contract relied upon in this case, one that is prohibited by the act of Congress to regulate commerce, being the act usually called the Interstate Commerce act? If so, then the judgment of the Supreme Court of Arkansas is correct, if not so prohibited, then its judgment is erroneous and should be reversed.

It will be observed that at the time of the execution of this contract, the railroad had not been completed to Rankin and that there were no published tariff freight rates from that point. It will not be contended that the contract at that time was invalid. Both parties acted upon and lived up to the provisions of this contract for about one year from the time Kizer established his mill at that place. No complaint is made that it was an invalid contract during that time.

But it is claimed that because the railroads leading out of Texarkana, that had before been carrying the lumber delivered to them by the Texarkana & Ft. Smith Ry. Co. and giving it a rebate of from two to four cents per hundred pounds in Nov. 1892 withdrew their rebates refusing thereafter to allow the Texarkana & Ft. Smith Co. anything, permitted the Railway Co. to ignore and break this contract, and that in so doing the Railway Co. is protected by the legislation of Congress regulating Interstate Commerce.

So long as the Railway Co., could collect from two to four cents per hundred pounds from its connecting carriers, the contract seems to have been by it considered reasonable and valid, but as soon as these connecting carriers, whether rightfully or wrongfully, refused to allow any pro rates, then the contract

seems to have become unreasonable and invalid.

But it is a broader question that is presented and an important one to the business world, and that is, whether or not a shipper cannot by a special contract, valid at the time it is executed, have the full benefit of such contract for a reasonable time in the future, notwithstanding the Interstate Commerce act of Congress.

"Contracts valid when made, continue valid and capable of enforcement, so long at least, as peace lasts between the goverments of the contracting parties, notwithstanding a change in the conditions of business which originally led to their creation.

The power to regulate commerce among the several States was vested in Congress in order to secure equality and freedom in commercial intercourse against discriminating State legislation; it was never intended that the power should be exercised so as to interfere with private contracts not designed at the time they were made to create impediments to such intercourse.

The arguments of the plaintiff's in error would lead to the abrogation of all contracts of the Iowa Railway Company which might prove from such subsequent events to be more onerous than contracts made after such events had happened. A contract for example for the supply of coal for the engines of the Company, made upon terms which were at the time reasonable, might be felt to be very hard and oppressive, if before the termination, the discovery of new fields of coal in the vicinity of the road should reduce the market price of the article one half. To assert that the enforcement of a contract of this kind would be repugnant to the commercial power of Congress, because the

expenses of transportation would be less if the contract were annulled, would not be more extraordinary than the position assumed by the appellant in the present case, and would be equally entitled to consideration.

When counsel speaks of the public policy as established by the Acts of Congress mentioned, he must mean nothing more than that the Acts were intended to facilitate commercial intercourse among the states. Undoubtedly such was the case, and it is of great public interest that such intercourse should be free and untrammelled. But if comparisons may be made with respect to a subject of this nature, we should say that the observance of good faith between parties and the upholding of private contracts and enforcing their obligations are matters of higher moment and importance to the public welfare, and far more reaching in their consequences."

Dubuque vs. R. R. Co. vs. Richmond, 19 Wall. 584.

True, this decision was rendered before the enactment of the Interstate Commerce Act, but since its enactment we find the following:

"The act to regulate commerce does not undertake to deal with the subject of rates for transportation services or with the business considerations which may influence common carriers in so adjusting them as fairly to increase their revenue, while paying due regard to the convenience of the public any further than to declare the general principle that such rates shall be reasonable and just, shall be free from unjust discrimination and shall confer no undue or unreasonable prejudice or disadvantage. Subject to these conditions and limitations the act does not and was not intended to restrict the common law right and power

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of the common carriers to make special contracts, or adjust their rates with reference to existing wants and circumstances so as to promote their own interest while affording all proper and reasonable facilities and conveniences to the public. Subject to the above conditions the act intended to leave the adjustment of rates as absolutely and completely in the discretion of the carrier as it existed at common law, which never questioned or denied to carriers the right to give or make lower rates based on increased quantity or amount of service."

And again.

"Subject to the two leading prohibitions that their charges shall not be unjust and unreasonable, and that they shall not unjustly discriminate so as to give undue preference or advantage or subject to undue prejudice or disadvantage persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded sound and adopted in other trades and pursuits."

Interstate Commerce Commission vs. Baltimore & Ohio R. R. Co., 43 Fed. R. 37.

This case was affirmed in this Court.

Interstate Commerce Commission vs. Baltimore & Ohio Ry. 145 U. S. 263.

The same is sustained in

Texas & Pacific Ry. vs. Interstate Commerce Commission 162 U. S. 197.

If now, as above stated, this Railroad Company at the time it entered into this contract, had power to make special contracts and to manage its interest upon the same principles which are regarded as sound and adopted in other trades and pursuits, can it be doubted but that the parties had the right to enter into this contract? There being at that time no authorized or adopted rates from Rankin, there were no rates with which there could be any conflict and it was certainly good for both parties to enter into this or a similar contract.

This was a new railroad extending out through a sparcely populated territory which is but a continuation of the yellow pine forest that covers the greater part of South West Arkansas, North Louisiana and North East Texas. The only local export this road could hope to have for years was this pine lumber. By reason of the road having no other outlet than through Texarkana, by this contract this portion of this one pine forest could compete with other portions.

It was for the business interest of the railroad to encourage the building up of the saw mill industries along the line of its road by such contracts good for a limited time until such industries had become established, and at the same time add to the freights and business of this infant railroad, and it was also good for Kizer to obtain a contract permanent for a reasonable time as to the freight rates to be charged for the shipment of his mill products. In fact, we do not conceive that any prudent business man could have done otherwise than Kizer did. Who would go out into a wild country to establish a manufactory where all the products must be shipped to distant markets, and where the only carrier is but one uncompleted local railroad,

without first obtaining some kind of a reasonably permanent contract as to these rates? To say that the railroad could not make such a contract would be to say that the carrier was not "free to make special contracts looking to the increase of their business."

The Texas Railway Commission Act provides:

"If any railroad subject hereto, directly or indirectly or by any special rate, rebate or drawback or other device, shall charge, demand, collect or receive from any person, firm or corporation a greater or less compensation for any service rendered or to be rendered by it than it charges demands, collects or receives from any other person, firm or corporation for doing a like and contemporaneous service, such railroad shall be deemed guilty of unjust discrimination, which is hereby prohibited. Revised Statutes of Texas §4574.

In a case where the plaintiff contracted in the early part of the year for freight rates for the summer on a crop of watermelons to be by him planted and the defendant a Railway Company, refused to carry out this contract, whereby damage was alleged to have accrued, the Court of Civil Appeals of Texas in reversing a judgment that had been rendered by the District Court, say:

"It is contended by the appellee that the contract was void also because it was an agreement to do what appellee was legally required to do, and, by virtue of the effect of the Commission Act, the contract was without consideration to support it. This position would be entitled to weight if the law was such that a railway could charge for transportation only at some rate previously fixed by the Commission, no more and no less. But

that is not the statute. The act, as we understand it, even when rates have been fixed, does not enjoin the railway company from charging a less rate than the Commission has named, provided it makes no discrimination, (Secs. 14 and 15) and therefore, even in cases where the Commission has fixed the rates for a railway company, it cannot be said that it is powerless to make contracts for transportation."

Thompson vs. San Antonio & A. P. Ry. Co., 32 S. W. Rep., 427.

We understand the Inter-State Commerce act of Congress must be interpreted in the same manner, that even if the Road has established and approved rates, there is nothing in the act that prevents the carrier from voluntarily reducing these rates, especially in order to increase its business. Of course, having made the change for one shipper, it might be required to make the same change for all other shippers under like circumstances and conditions, but whether or not the railroad company might not be compelled to give the others similarly situated the same rates is not the present question, if it had the right at the time of its execution to make this special contract.

The fact, if it be true, that this contract eventually proved to be an unfortunate and losing one for the Railway Company can be no sufficient defence to its validity. Innumerable are the contracts made between parties that prove disastrous to one of them and yet we have never seen this defence standing by itself to prevail in a Court of Justice. Had Whitaker, the president, manager and owner of this railroad with the same prudence and foresight that Kizer exercised, made contracts with his connecting carriers at Texarkana, that until the 1st of January 1897,

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his road should receive from them two cents per hundred pounds on all lumber turned over to them as connecting carriers, then he would have been protected, but this he did not do and so far as the proof shows did not attempt to do, but made this absolute contract with Kizer assuming that during its continuance he, Whitaker, would at all times be able to obtain these rebates that were then being granted to his road. It seems to us clear and conclusive that both morally and legally the Railroad and not Kizer should be responsible for the loss occasioned by the Railroad's breach of this contract.

Where parties agreed in a contract in consideration of of money for the development of ore and the construction of a furnace and railroad, to give all their traffic to the Railway Company, the Supreme Court of Pennsylvania in an action in equity, reversed the ruling of the Lower Court in sustaining a demurrer to the bill and sustained the covenant requiring the covenantors to ship over said Railway.

Bald Eagle Valley R. Co. vs. Nittany Valley R. Co. 33 Atlantic R. 239.

In the decision the Court says:

"The right of every shipper is to make a contract with such common carriers as he chooses to carry his goods to destination. If he makes none expressly, the law implies one with the carrier who accepts his goods. But he cannot make contracts with two or more carriers to carry the same goods. If he do, as but one can carry, the others can invoke the law as a remedy for his violation of contract. If he contracts with a railroad to lay its rails to his manufactory or furnace, and furnish him money to aid him in bringing the raw material to the furnace, and he

in consideration, promises to give the railroad company the transportation of such manufactured product to market at reasonable rates, how is the shipper deprived of any right? He but exercises the right guaranteed by the constitution. He contracts for the carrying of his own product for shipment to market, from his own manufactory, with whom he pleases. The constitution does not go further, and guaranty him a right to violate his contract when he pleases."

Suppose now that in November 1892 another railroad had been built from Texarkana to Rankin and that Kizer had commenced to ship over this new road, under the law as announced in this Pennsylvania decision Kizer could have been enjoined from so doing. Would not he have at once been laughed out of Court, if for his answer in this injunction suit, he should set up, that the rates he was then getting under his contract with the defendant in error in this case were so low that the defendant in error was losing money on each piece of lumber transported. Again if at the time the connecting carriers withdrew their rebates, the Railway Co., had believed this withdrawal was but temporary, or for any other reason had concluded it still desired to continue its written contract with Kizer, could Kizer have declared the contract at an end, and commenced having his lumber carried to Texarkana by some other means of transportation without being liable to the Railway Company for damage for his breach of this contract.

The Circuit Court of Appeals for the Fifth Circuit in passing upon the Interstate Commerce Act say: "On the contrary as we read the act it is strongly implied that the carrier will not only be liable to the government and to any private party injur-

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ed for its violations of the provision of the interstate commerce act, but that it will also certainly be bound on its contracts. If it were otherwise it would, as we have said put on shippers a burden too grievious to be borne, and open a door to the practice of fraud and oppression by the agents of corporation carriers."

Pond-Decker Lumber Co. vs. Spencer, 86 Fed. R. 846.

"A common carrier has the right to contract to ship freight at a lower rate than the published tariff rate, if he choose to do so; and such a contract is not against public policy, unless the privilege to ship at such rates is granted exclusively to the shipper with whom it is made, or is denied to other shippers. It is the exclusiveness of the privilege granted to one and denied to another which makes the discrimination and renders the contract void as against public policy."

Christie vs. Missouri Pac. Ry. Co., 94 Mo. 453, S. C. 7 S. W. Rep. 457.

It will be observed that Kizer's contract did not specify that he was to have any advantage over any other shipper simularly situated. By this contract no discrimination was made between Kizer and other shippers. None was intended, but the only object was to obtain for a definite term definite maximum freight rates, which were then lawful.

The Interstate Commerce Commission through Judge Cooley, its chairman, in *re*, Chicago, St. Paul and Kansas City R. Co. 2 Interstate Commerce Commission Rep. 137 in a well considered opinion held that, "The provisions in the act to regulate commerce, that all rates shall be just and reasonable, was a provision inserted for the protection of the general public, and not for the protection of the carriers against the action of their own of-

ficers or against the action of rivals. The carriers were supposed to have means of self protection against unreasonably low rates in the power they had to make the rates themselves."

In this case Judge Cooley used the following language:

"But every statute is to be read in the light of its history and of the evils it was intended to redress. And as matter of public history, nothing can be more notorious than that the Act to Regulate Commerce had for its leading and general purpose, to which other purposes were subordinate, to provide effectual securities that the general public, in making use of the means of railroad transportation provided by law for its service, should have the benefits which the law had undertaken to give, but of which, in very many cases, it was found the parties entitled to them were deprived by the arbitrary conduct, the favoritism, or the unreasonable exactions of those who managed them. It may be affirmed with entire confidence that the act was not passed to protect railroad corporations against the misconduct or the mistakes of their officers, or even primarily to protect such corporations against each other. The act does, indeed, require them to afford reasonable, proper and equal facilities for the interchange of traffic between their respective lines: but even this requirement was for the public benefit more particularly than for the benefit of the carriers themselves. Everywhere in the Act the primary purpose apparent in its provisions is that individuals dealing in matters of transportation with the carriers regulated by it shall not, in respect to the conveniences the carriers are supposed to offer to the public, be wronged by arbitrary conduct, or by favoritism, or be subjected to extortion. It is to this end that the act declares that all charges made by the car-

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rier it regulates shall be reasonable and just, and the purpose of the declaration is to establish the rule that the charges shall not be extortionate."

Again, there was no finding that the rate given Kizer was not a just and reasonable rate. True, the Circuit Court found that "lumber cannot be transported from Rankin or other points on defendant's line to Texarkana without loss to the railroad at a less rate than 4 cents per hundred pounds."

In Ry. Co. v. Smith, 60 Ark., 221, it is held that because the rates are so low and unremunerative that the railroad cannot be operated without an actual loss, is not sufficient to show that the rates are unreasonable.

To the same effect:

Ry. Co. v. Gill, 54 Ark., 112.

Reagan v. Farmers L. & T. Co., 154 U. S. 362.

The plaintiff and defendant entered into a legal and proper contract as to freight rates that was to last for five years. This contract was carried out for one year, when the defendant, without any just or legal cause, violated this contract and voluntarily established higher freight rates. This it was not compelled to do, either by statute or any order of the Inter-State Commerce Commission. Can the Railway Company now claim that its wrongful act in thus voluntarily increasing its rates is a defence to its breach of contract?

We, therefore insist that the contract that is the basis of this suit is a valid contract, and that the decision of the Supreme Court of Arkansas in holding said contract to be void because in conflict with the Act of Congress to regulate commerce is erroneous, and as that was the sole question decided, we pray that

the judgment of the Supreme Court of Arkansas in affirming the judgment of the Lower Court may be reversed, and for other relief.

Respectfully Submitted,

OSCAR D. SCOTT,

Attorney for Plaintiff in Error

In the Supreme Court of the United States.

A. J. KIZER, *Plaintiff in Error.*

vs.

TEXARKANA & FORT SMITH RAILWAY CO., *Defendant in Error.*

Brief of Defendant in Error.

As an apology for the brief discussion of the question herein, we beg to state that the clerk of this Court informed us, in a letter dated September 15, 1900, that this case would be called about December 1, and in a letter dated October 25, 1900, that said case would be called the latter part of the week beginning December 3, 1900. On November 6, 1900, we received a telegram from the clerk notifying us that the case would probably be called on Monday,

November 12. We were on that day engaged in the preparation of our brief, relying upon the clerk's letters as to the time when same should be filed. As we have not time to discuss the subject fully, we merely state the points upon which we rely and cite the authorities to sustain the same.

The plaintiff in error has not made a full statement of the facts, circumstances and conditions surrounding the execution of the contract upon which this action is based. Said contract shows, on its face, that Kizer had already determined to locate his mill at Rankin, Arkansas, and had selected the site for the mill. The first clause of the contract states that fact. Said Kizer is not, therefore, in a condition to contend that he was led to locate his mill at Rankin by reason of the execution of the so-called contract. The said contract was signed September 16, 1891. At that time the appellee's road was built to a point within ten miles south of Rankin, and was in course of construction to Rankin and northward. It was completed to Rankin in December 1891, only a few months after the alleged contract was signed. Kizer knew, at the time he obtained the alleged contract, that the road would be built to Rankin, and he had already bought lands and obtained options on other lands in that county, from which he expected to obtain timber for use in his mill.

The railroad company, at the time of the execution of said contract, was an interstate common carrier. It extended into the states of Texas and Arkansas. There were al-

ready located on said railroad four sawmills; one at Wilton, one at Ashdown, one at Ogden, and one at Corbin. These mills were in operation and were shipping lumber over the appellee's road, at the published and established rates as shown by the record. Prior to November 30, 1892, the appellee did not have a published rate sheet, separate and apart from other roads in connection with which it was doing business. Each of the railroads leading out of Texarkana published a rate sheet including all stations on appellee's road. These rate sheets were published at appellee's stations, and were the regularly established rates of appellee. Up to that date appellee charged only two cents per hundred weight from all stations on its line to Texarkana. The other roads above mentioned refused further to carry their rate sheets in that manner and refused to give the appellee the prorate of two cents more and therefore the appellee elected to publish a tariff rate of its own. After due notice that was done. That tariff established a rate of three cents to Texarkana, instead of two cents, as previously established. On all other roads leading into and out of Texkrkana, a charge of five cents per hundred weight for five miles and under was the usual, reasonable and regularly established charge. Two cents was less than the appellee could carry the lumber to Texarkana for. It was enabled to carry it at that rate by reason of a prorate allowance from the other roads. When the other roads declined to allow it that prorate it of course was compelled to establish a rate of its own.

The alleged contract was made under rather singular, and in a sense, suspicious, circumstances. There were at least four competitors of the plaintiff in error located on the same line of road at the time. William Buchanan was a director in the company. The plaintiff's father-in-law was also a director in the company and it was the express understanding between these directors and the plaintiff, who afterwards became agent of the appellee, that these three parties, including the two directors and appellee's agent were to become the sole owners of the mill mentioned in the contract and were to receive the benifits of said contract. This was the agreement at the time the contract was signed. For reasons best known to themselves, Buchanan and Estes, the disectors, did not participate in the building of the mill. From the time that appellee's road reached Rankin until November 30th, when the new schedule of rates was put in force, every shipper was charged the same rate, to wit, two cents. After that every shipper was charged the same, to wit, three cents per hundredweight. The plaintiff being located at the north end of the railroad at that time had an advantage over all the others, as he obtained a longer haul than any of the others for the same rate. The alleged contract was in fact never delivered to the plaintiff in error, as it remained in the possession of William Buchanan, one of the directors of the road.

The testimony also shows that the present company never had any notice of any nature as to the existence of any such contract. The testimony also fails to show that the

President, Whittaker, had any authority whatever to execute such a contract. The plaintiff introduced no testimony to show any authority. The answer denied the execution of the contract and denied the authority of Whittaker to sign the same and denied the delivery of the contract. (*See* answer, pages 17 to 19.)

Upon the state of facts disclosed by the record our contentions are as follows:

I.

The Supreme Court of Arkansas as well as the lower Court, should have held that there was no authority for the execution of the contract. The facts in the record fail to disclose any authority and there is no presumption of law that the president had the authority to make any such contract.

1. *Elliott on Railroads, Sec. 283 and authorities there cited.*

II.

Said contract was never delivered to the plaintiff, and was therefore, never executed. It was left in the possession of William Buchanan, one of the directors, and therefore the absence of any intention to make it the contract of the company fully appears.

Clark on Contracts, page 127.

III.

The alleged contract is not in truth a contract. The same is wanting in mutuality.

Clark on Contracts. page 165, et seq. and authorities there cited.

There was nothing binding on the plaintiff to build the mill at Rankin and the road could not have maintained an action against him for his failure to do so.

IV.

The contract is also void for want of any consideration to support it. The first section of said contract attempts to bind the plaintiff to build a sawmill at a point already selected by him. That is the only undertaking set out in that part of said contract. In consideration that he should build said mill, the railway company agrees to furnish him cars and ship his lumber at a rate not to exceed two cents per hundred pounds. If there is any agreement in that part of the contract at all, binding on the railway Company, it is that said company agreed to do that which the law compels it to do. The railway company is a common carrier and is compelled by law to furnish cars and transport goods of all people at rates which are the same to everybody. Said railway company was therefore, bound, under the law, to do the very thing which it agreed to do in said section two of said contract. It could do no more and it could do no less. As to the rate of two cents, if that was the regularly established rate it could charge that if it charged the same to everybody else. There is therefore nothing in the contract. It is a well established principle of law that where a party agrees to do a thing which he is already bound to do such agreement furnishes no consideration upon which a contract may be founded.

Clark on Contracts, p. 184,
Killough vs. Payne, 52 Ark., 147,
3 Amer. and Eng. Enc. of law, p. 832 and note 4.
Thompson vs. Robinson, 34 Ark., 52 and authorities,
1st Parsons on Contracts, p. 429,
Worthen vs. Thompson, 54 Ark., 152,
Vestel vs. Knight, 54 Ark., 100.
Blakefield vs. Halpern, 53 Ark., 345,
Hallett vs. Spratlin, 54 Ark., 185
Jenkins vs. Shinn, 55 Ark., 347,
Gaar vs. Green, 68 N. W. R., 318,
Moran vs. Peace, 71 Ill. App., 135,
Spencer vs. McLain, 50 N. E. R., 769.

V.

For the reasons above stated the Circuit Court of Little River County, and also the Supreme Court of Arkansas, should have held the alleged contract void and should have decided the case in favor of the railway company on the grounds above mentioned, and, therefore, there is no Federal question involved in the controversy and for that reason the appeal should be dismissed, as the decision should have been upon other grounds than that of a Federal question. The writ of error should now be dismissed.

Harrison vs. Morton, 171, U. S., 39.
Castillo vs. McConnico, 168 U. S., 674.
Rutland R. Co. vs. C. V. R. Co., 159 U. S., 630.

But if the Court should be of the opinion that we are in error in the above contentions. then we submit that the contract is void because prohibited by the Interstate Commerce Act. The second section of that act provides: "That if any common carrier, subject to the provisions of this act, shall directly or indirectly, by any special rate, rebate, drawback or other devise, charge, demand, collect or receive from any person or persons a greater or *less* compensation for any services rendered or *to be rendered* in the transportation of passengers or property subject to the provisions of this Act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneus service in the transportation of a like kind of trafic under substantially similar circumstances and conditions, *such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and decleared to be unlawful.*" The same law makes it a crime for any common carrier to charge one person either more or less than another under the conditions above mentioned. The appellee is subject to the provisions of this Act. *It was subject to those provisions on the date of the contract mentioned.* It then existed in two states and was transporting persons and property from one to the other. Said act therefore applies with all its force to appellee. To carry out said contract would, therefore, be a crime both on the part of the appellant and the appellee.

So for as the facts are concerned, they are found against the appellant by the court below. It can not be just for the

railroad company to transport, for Kizer, lumber at less than cost, and to transporrt it for other people at a profit. If any contract can be in violation of said interstatate commerce law this one is. The Court found as a fact that lumber could not be transported except at a loss, at a two cent rate at the time that this contract was made and afterwards, and also found that the appellee collected from all persons, including the plaintiff in error, exactly the same rates and charges at all times. The Court further found that said charges were made under the same conditions and circumstances and that no more and no less was collected from the plaintiff in error than from any of the others.

Plaintiff in error makes the argument that the contract was valid at the time it was made and therefore, notwithstanding that it afterward secured to the plaintiff an unjust discrimination over other shippers, it was not in violation of the law of the United States. In point of fact that contention is not well founded. The contract was not valid when made. All the facts in this case show that the plaintiff was attempting to secure, for himself and associates, a special privilege not granted to other shippers. It seems to have been in his mind at the time the contract was made that it would soon become necessary for the appellee to change its rates from time to time as conditions and circumstances might require. He knew that the varying phases and changes of commerce would require changes in rates. This every shipper as well as every railroad and every court knows. The plaintiff in error well knew that the two cent rate, then

inforce, could not last long, and he therefore endeavored, by the contract, to take advantage of other shippers and the public and put himself in a position where, notwithstanding his competitors would be compelled to pay a higher rate, he, by reason of an illegal contract, would not have such high rates to pay. If this was not his intention, then what could it have been? He certainly would not have tried to provide against a lower rate. The object in entering into the contract was that he should avoid a necessary advance of rates. The railroad company had the right to raise the rates. That is conceded by everybody. Kizer contends that his contract was valid when made because that was the rate at that time, and his counsel commend his foresight in making such an advantagious contract to last for five years. To prevent such contracts was one of the objects of the Interstate Commerce law. If Kizer or other shippers can, when rates are low, make contracts binding the railroad company to that low rate for a term of years, then the Interstate Commerce law is a farce and the Interstate Commerce Commission might just as well close its doors and retire from business.

When this contract was made the railroad was doing interstate business. It was at that very time shipping lumber from other mills near the plaintiff in error, out of Arkansas and into Texas and other States. Plaintiff in error knew that the rate was two cents. The road knew it and the Directors knew it. His prospective partners, Buchanan and Estes, also knew it. All of them knew that the railroads at Texarkana had the absolute right to

withdraw from the agreement at any time and that if that agreement was withdrawn it would be necessory to advance the rates. To provide against such reasonable and fair advance of rates as against him, the plaintiff in error, through his influence with the directors and the president of the railway company, secured this unjust and unfair contract and now insists that it was valid when made. It is against just such contracts, as stated above, that the Interstate Commerce law was leveled. Plaintiff in error contends that the railroad company carried this contract out for one year and then abandoned it. The evidence doee not establish that fact. The railroad company charged the plaintiff the same rates that it charged all others from the beginning. It therefore appears that the contract had nothing to do with the matter whatever. It seems never to have been recognized at any time or by any body. The evidence fully establishes this point.

It is conceded in this case, and not denied by plaintiff in error, in his brief that the rate of three cents was a fair, reasonable and just rate. It is not denied that the railroad company could not carry the lumber for less than four cents. The plaintiff's position is that he had a right, under the Interstate Commerce law, to take advantage of a low rate, on account of conditions existing at Texarkana, and bind the railroad company to that low rate, notwithstanding he concedes the right of the road to raise the rate as to all the other shippers. It was right that the rates should be raised It was the duty of the road to raise them. It had the right,

under the law, to do so. It pursued that law and raised the said rates in accordance with that law. There is no provision in the law for the plaintiff to make such a contract and escape the raise of rates.

Counsel for plaintiff in error forget every interest except that of the plaintiff, in their argument. They forget that the public is interested in the operation of railroads. The public, as shown by the authorities hereinafter cited, is as much interested as any individual shipper. It is a wrong to the public that Congress is guarding against. It is an effort to put down monopolies and unfair discriminations. If the railroad company had the right and power to make this contract with the plaintiff then it had the right and power to make a twenty-cent rate. Will the plaintiff admit that a twenty-cent rate would have been binding, when the railroad was at the same time charging all other shippers a three-cent rate? If the railroad company and the plaintiff had the right and the power to make a rate of two cents then they had a right and the power to make one for thirty cents. If one is binding the other would be also. Both would be in the very teeth of the Interstate commerce Act, and would therefore be null and void.

Said contract, was, therefore, invalid when made and never was valid. It was never recognized by the railroad company and was never attempted to be carried out by it. It is true that for more than a year the railroad company charged two cents but at the same time it charged all other persons the same.

That such a contract is absolutely null and void we cite the following authorities:

Addyston Pipe and S. Co. vs. U. S., 20 Supt. Ct. Rep. 96,

Bullard vs. N. Pac. R.R. Co., 45 Am. & Eng. R. R? Cases, ## 234

s. c., 11 L. R. A., 246;

C. R. I. & P. Ry? Co. vs. Hubbell, (Kan.) 38 Pac. Rep., 266,

Briske, vs. N. C. St. Ry. Co., 82 Ilt. App., 256.

Sou. Wire Co. vs. St. L. B. & T. Co., 38 Mo. App., 194,

Hawley vs. K. & T. Coal Co., (Kan.) 30 Pac. Rep., 14,

Kates vs. A. B. & C.Co.,(Ga.)34 S. E. R., 372.

Messenger vs. P. R. R. Co., 36 N. J. L., 407,

s. c., 37 N. J. L., 531 and 13 Am. Rep. 457.

Scofield vs. Lake Shore, etc., Ry. (Ohio), 3 N. E. R., 907,

s. c. 23 Am. & Eng. R. R. Cases, 612.

Sanford vs. R. R. Co., 24 Pa. St., 383,

McDuffie vs. P. & R. R. R. Co., 52 N. H., 430.

Fitzgerald vs. Fitzgerald Mallory Co. (Neb.) 59 N. W. R. 862.

State vs. C. W. & B. Ry. Co. (Ohio) 23 N. E. R., 929.

Raleigh & G. R. Co. vs. Swanson (Ga.) 28 S. E. R. 602.

s. c. 39 L. R. A. 256.

In Re Grand Trunk Ry., 2 Int. Com. Rep. 207.

In Re Tariffs of the trans-continental lines, 2 Int. Com. Rep. 685.

Reynolds vs. W. N. Y. & P. R. Co., 1 Int. Com. Rep. 76.

Fitzgerald vs. Grand Tr. Ry. Co. (Vermont) 22 At. Rep. 76.

None of the authoritios cited by plaintiff in error hold that a railroad company may make a contract such as that upon which this action is brought. In all of them the principle is recognized fully by this court and others that there can be no discrimination.

For the reasons above indicated and for the reasons set out in the authorities above cited we submit that the decision of the Supreme court of Arkansas should be affirmed.

Respectfully Submitted,

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No. 100.

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Br. of Lathrop, Morrow, Moore
Read for D. E.

Filed Nov. 13, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 100.

A. J. KIZER, PLAINTIFF IN ERROR,

vs.

TEXARKANA AND FORT SMITH RAILWAY CO.,
DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR.

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(17,467.)

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SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR.

In the hurried preparation of the main brief one of the most important points affecting the jurisdiction of this court was overlooked and omitted. It is this:

The court below sustained the validity of the interstate-commerce law enacted by Congress. The only ground upon which the plaintiff in error bases his right to have the decision of the supreme court of Arkansas reviewed by this court is "that in this case is involved and actually was raised and decided a Federal question solely, to wit, the construction of the Interstate Commerce Commission act and of sections 1, 2 and 3 thereof, and the decision of this court is adverse to this plaintiff" (Transcript, p. 3).

It will be seen that the defendant in error claimed that the contract sought to be enforced was null and void because prohibited by sections 1, 2, and 3 of the interstate-commerce act. In other words, the defendant claimed the right to disregard said contract because under the terms of the said act of Congress the same was null and void, and the supreme court of Arkansas maintained that position of defendant.

The right to review the decision of the State court, if any there be, must be found under section 709, Revised Statutes of the United States. That section provides as follows:

"A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision is against their validity * * * may be re-examined and reversed or affirmed in the Supreme Court of the United States."

This court held in Missouri *vs.* Andriano, 138 U. S., p. 496, that when a decision of a State court is in favor of a right or privilege claimed under a statute of the United States this court has no jurisdiction to review it. This language is used in the opinion: "While there is some force in the argument that the right of review in cases involving the construction of a Federal statute should be mutual the act limits such right to cases where the State court has decided *against* the title, right, priviledge or immunity set up or claimed under the statute." "The object of the present judiciary act," says the court, "was not to give a right of review whenever the validity of an act of Congress was drawn in question, but to prevent the courts of the several States from impairing or

frittering away the authority of the Federal Government by giving a construction to its statutes adverse to such authority." This case we regard as conclusive of the question of jurisdiction of this court over this case.

Respectfully,

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Supreme Court of the United States.

No. 100.—October Term, 1900.

A. J. Kizer, Plaintiff in Error,
vs.
The Texarkana and Fort Smith Railway Company.
} In error to the Supreme Court of the State of Arkansas.

[December 3, 1900.]

Mr. Justice Peckham delivered the opinion of the Court.

The plaintiff in error commenced an action against the defendant in error in a circuit court of the State of Arkansas to recover damages for the breach of an alleged contract between the parties, by which the railroad company agreed to furnish cars and to transport over its road and into points in the State of Texas certain lumber for the plaintiff in error from his saw mill in Rankin, in Little River County, in the State of Arkansas, at a certain rate of compensation, and it was alleged in the plaintiff's complaint that the defendant had violated that contract by charging a greater sum for the transportation of such lumber than had been agreed upon, and the plaintiff sought to recover from the defendant in error the excess paid by the plaintiff over the contract price.

Several defenses were put in by the defendant, and among others it set up that the contract was illegal, because the transportation of the lumber from Rankin, in the State of Arkansas, to places in the State of Texas over defendant's road was interstate commerce, and the contract therefore violated sections 1, 2 and 3 of the interstate commerce act, (Chap. 104, 24 Stat. 379,) in that it made a discrimination in favor of the plaintiff.

The trial court held that the contract did violate that act, and was, therefore, void, and could not be enforced or damages recovered for its breach.

Plaintiff in error then appealed to the Supreme Court of Arkansas, where the judgment was affirmed, the court saying, in its opinion, that "the facts in this case, as found by the court, as set out in the statement of facts, show that the contract upon which the appellant relies is within the prohibitions of sections 1, 2 and 3 of the interstate commerce law, enacted by Congress. . . . We think the contract relied on in this case is prohibited by the act of Congress to regulate commerce, and is void."

Upon the affirmance of the judgment by the Supreme Court of Arkansas, the plaintiff brought the case here by writ of error.

He now says that, although he set up no claim of any title, right, privilege or immunity under the act of Congress, yet the claim which defendant specially set up under it was acknowledged and enforced by the State court, and the statute was thus construed unfavorably as to him, and that he has, therefore, a right to have the judgment of the State court, which was based on such construction, reviewed here under section 709 of the Revised Statutes of the United States. But that section provides, so far as here applicable, that when any title, right, privilege or immunity is claimed under a statute of the United States, and the decision of the State court is against the title, right, &c., specially set up or claimed under such statute, then and in such case the judgment of the State court may be reviewed by this court.

Here, the claim under the Federal statute has been allowed by the State court, and the contract sued on by the plaintiff in error has been denied validity because of its violation of that statute. It is not every case where a Federal statute has been construed by a State court that gives a right of review to this court, but the claim of any right, title, privilege or immunity under the statute must have been denied by the State tribunal in order to give us jurisdiction to review its judgment. That a Federal statute was construed unfavorably to one of the parties to the suit is no ground for jurisdiction by this court, unless such construction was not only unfavorable, but was against the right, &c., specially set up and claimed under the statute. In that case the party setting up and claiming the right under the statute, which has been denied, can obtain a review here. Thus it might happen, as it has happened in this case, that, while the decision upon the construction of the statute was unfavorable to the maintenance of the cause of action set forth by the plaintiff in error, it was not against, but in favor of, the claim made under the Federal statute. The question whether that statute, properly construed, prohibited the making of such an agreement as that set up in the complaint in the State court, having been decided in favor of the claim set up by defendant under the statute, this court has no jurisdiction to review the judgment. (*De Lamar Gold Mining Company* v. *Nesbitt*, 177 U. S. 523, 528, and cases there cited; *Missouri* v. *Andriano*, 138 U. S. 496.)

The writ of error is therefore

Dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.